



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

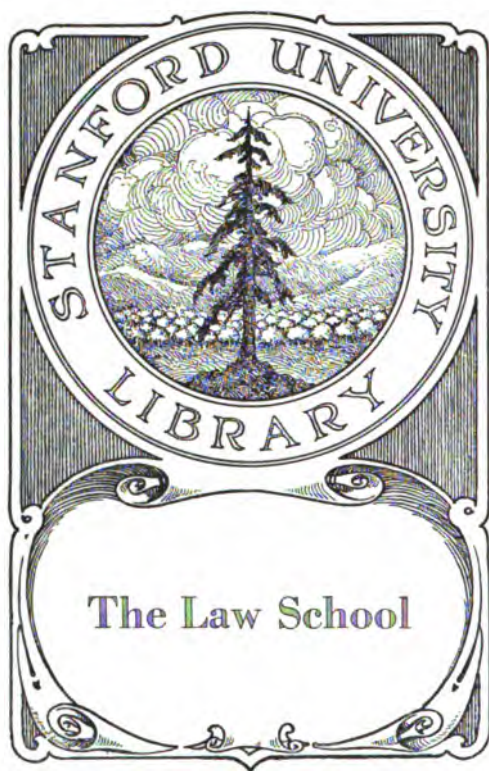
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

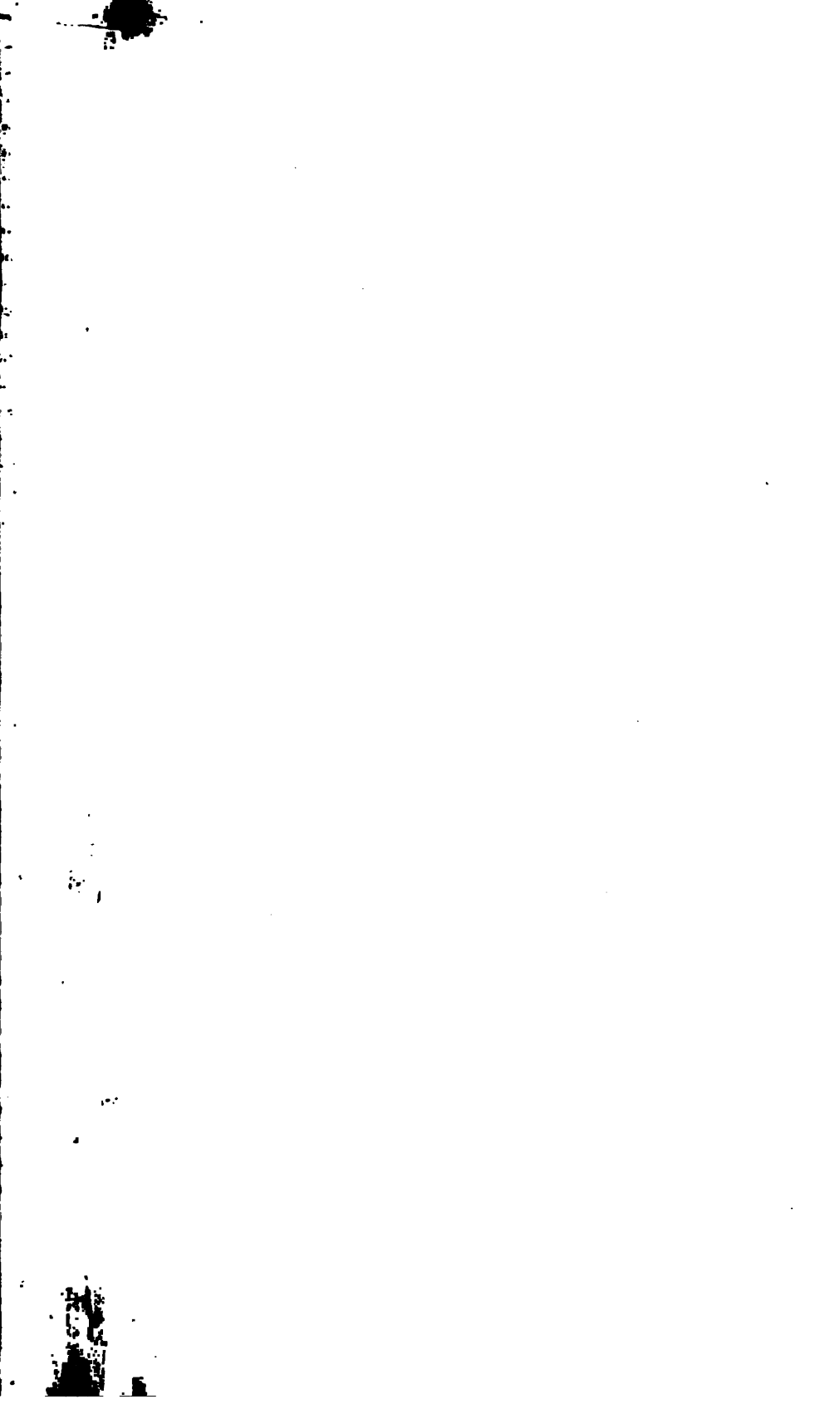
We also ask that you:

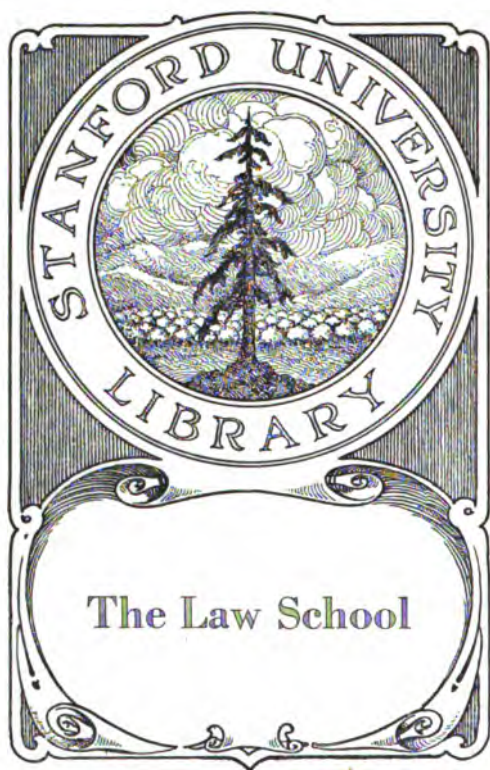
- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

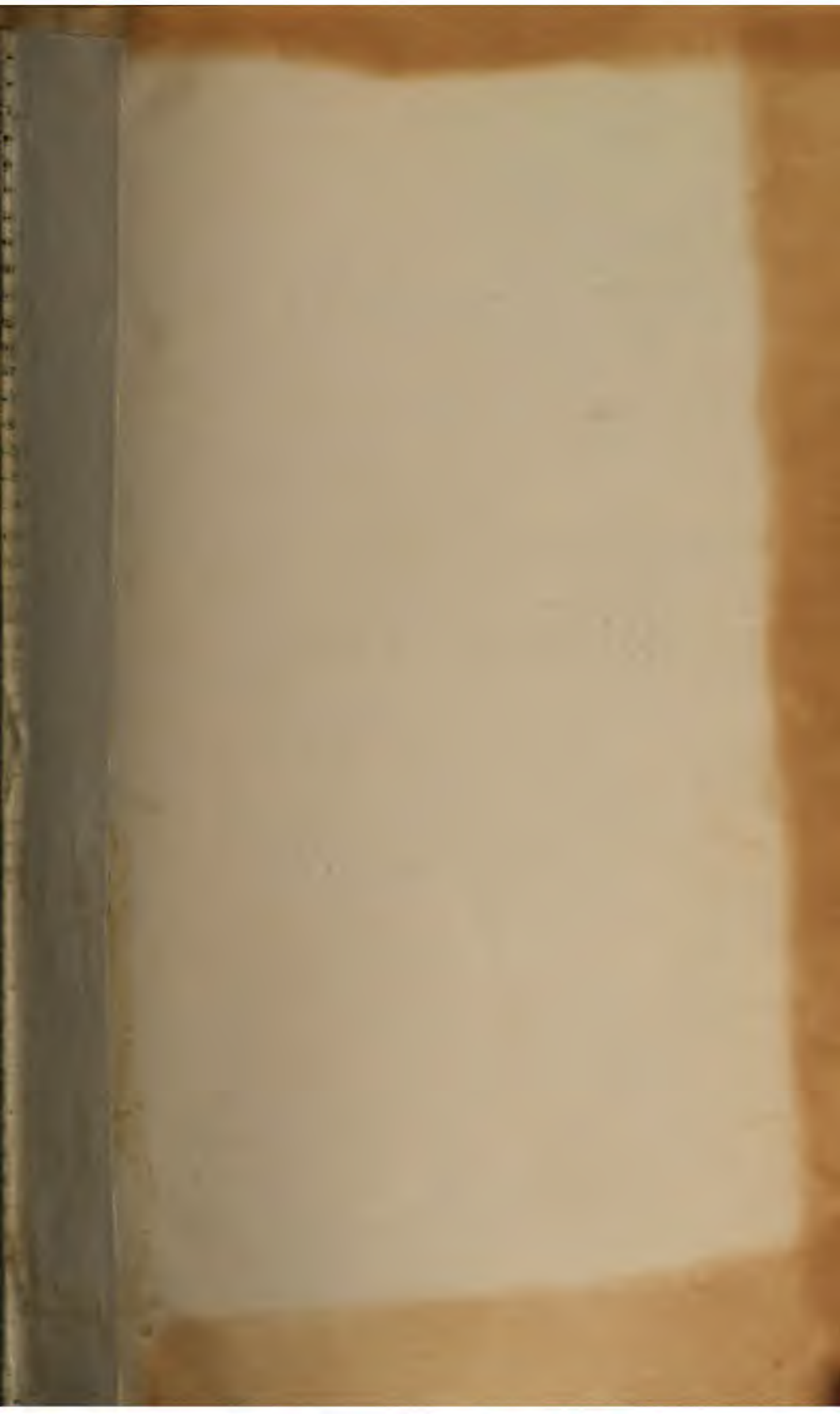
About Google Book Search

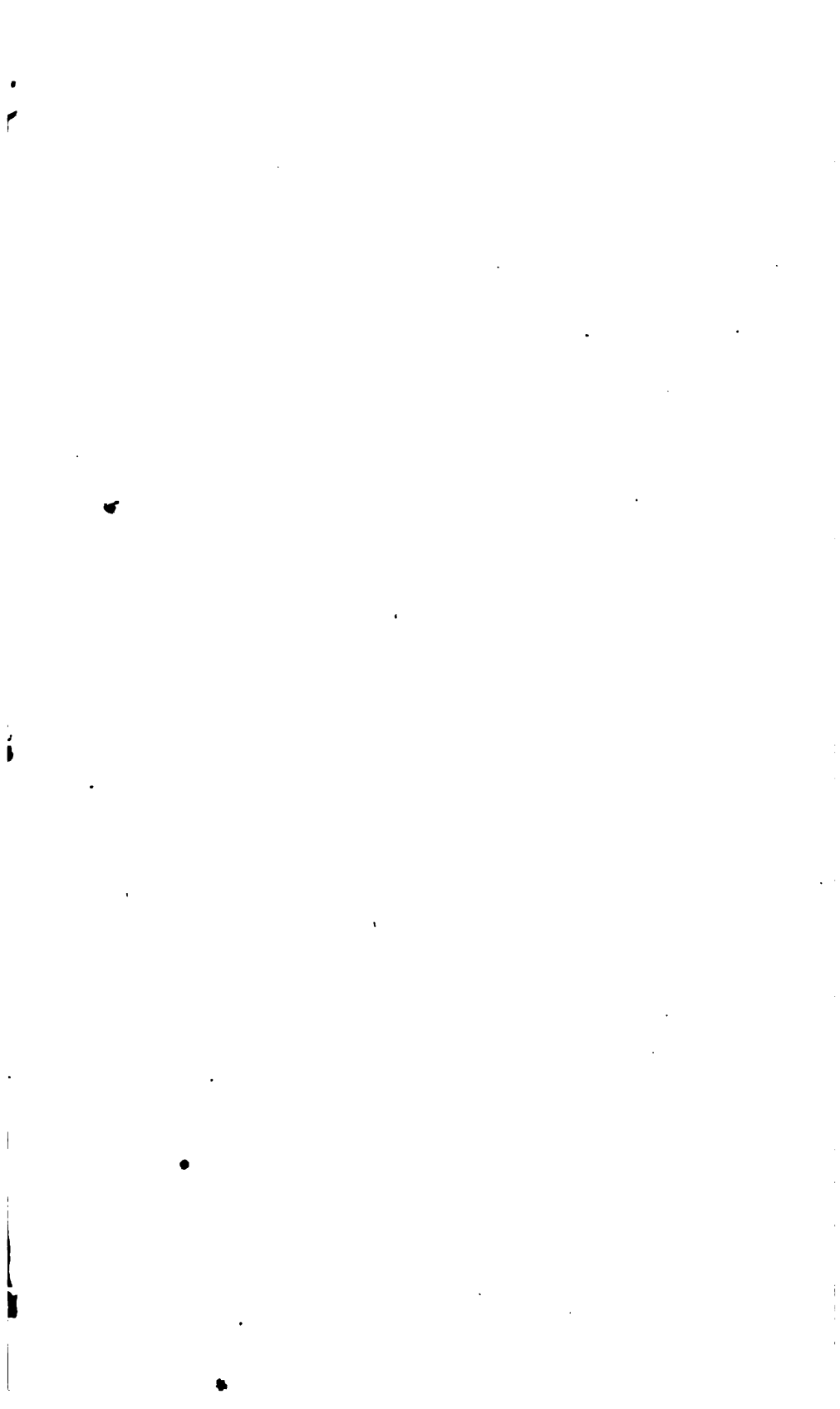
Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>













OFFICIAL OPINIONS
OF
THE ATTORNEYS-GENERAL
OF
THE UNITED STATES,
ADVISING THE
PRESIDENT AND HEADS OF DEPARTMENTS
IN RELATION TO THEIR OFFICIAL DUTIES,
AND EXPOUNDING THE CONSTITUTION, TREATIES WITH FOREIGN
GOVERNMENTS AND WITH INDIAN TRIBES, AND
THE PUBLIC LAWS OF THE COUNTRY.

EDITED BY
A. J. BENTLEY, Esq.

VOLUME XIV.

[PUBLISHED BY AUTHORITY OF CONGRESS.]

WASHINGTON, D. C.
W. H. & O. H. MORRISON.
1875.

340245

1 09078

VOLUME XIV.

CONTAINING
THE OPINIONS
OF
HON. GEORGE H. WILLIAMS,
OF OREGON.

ALSO CONTAINING OPINIONS GIVEN

BY

HON. BENJAMIN H. BRISTOW, of Kentucky,
Solicitor-General and Acting Attorney-General ;

HON. SAMUEL F. PHILLIPS, of North Carolina,
Solicitor-General and Acting Attorney-General ;

AND

HON. CLEMENT HUGH HILL, of Massachusetts,
Acting Attorney-General.



TABLE OF TITLES.

	Page.
Accounting-officers of the Treasury.....	65
Acting Secretary of War	200
Additional bounty	223
Administration of oaths in the settlement of claims	419
Alaska	327
American Atlantic Cable Telegraph Company	62
Appeal from decisions of the accounting-officers.....	104
Applications for pardon.....	20
Appointments and promotions in the Army	164
Appointment in the Army.....	499
Appointments in the Medical Department.....	10
Arkansas bonds.....	611
Arms issued for the militia of the United States.....	490
Attachment.....	426
Attorney-General	177
Attorney-General and Congressional committees	17
Authority of accounting-officers	412
Authority of internal-revenue officers.....	370
 Bankrupt-law.....	 330
Bids for transporting the mail.....	631
Bonds of consuls.....	7
Bridges across the Mississippi River.....	91
Buildings on military reservations.....	125
 California and Nevada volunteers.....	 40
Cape Mendocino light-house site.....	52
Carriage and delivery of letters.....	150
Case of B. C. Whiting.....	247
Case of Commodore R. H. Wyman	150
Case of David Quinn—compromise of claim	183
Case of François A. Heinrich	154
Case of General Schnyler Hamilton.....	506
Case of Goodsell, Bndillon & Co.....	658
Case of Hutchinson, Kohl & Co.....	302
Case of John R. Hennessey—bounty.....	581
Case of Lieut. A. H. Von Luettwitz	448
Case of Lieut. Col. B. S. Roberts.....	344
Case of Lieutenant-Commander Dyer and others.....	191
Case of Lieutenant Mansur.....	367
Case of Nelson H. Davis.....	117
Case of Paymaster Billings, of the Navy	547

	Page.
Case of Samuel J. Harris.....	965
Case of the Biddle Manufacturing Company.....	424
Case of the Edgar Stewart.....	589
Case of the steamboat Joseph Pierce.....	535
Case of Thomas G. Williams.....	329
Central Branch Union Pacific Railroad.....	606
"Charges and commission" cases.....	661
Cheyenne and Arapahoe reservation.....	451
Choctaw Indian bonds.....	28
Citizenship.....	402
Citizenship—case of Charles Levy.....	509
Claim for damages for breach of contract.....	24
Claim for use of turnpike during the rebellion.....	227
Claim of Caleb H. Blood.....	41
Claim of C. A. Perry & Co.....	137
Claim of Captain R. H. Wyman.....	36
Claim of F. W. Anschutz.....	214
Claim of George M. Giddings.....	526
Claim of Gideon J. Pillow.....	103
Claim of Lieutenant B. S. Humphrey.....	230
Claim of the assignees of Simeon Hart.....	145
Claim of William P. Adair.....	54
Claim of William T. Shirley.....	101
Claims for property lost in the military service.....	360
Claims for refunding internal-revenue taxes.....	615
Claims for use of patents.....	301
Clothing for invalid soldiers.....	14
Commissioners of Centennial Exhibition.....	48
Commissioners of Freedman's Savings and Trust Company.....	549
Commissioners of the District of Columbia.....	419
Compensation of diplomatic officers.....	534
Compensation of district attorney.....	384
Compromise of internal-revenue cases.....	8, 43
Computation of the value of foreign coins.....	353
Condemned vessels of the Navy.....	369
Congressional employ��s.....	612
Congressional Printer.....	201
Contracts for carrying the mail.....	651
Contracts with Post-Office Department.....	682
Contracts with the Government.....	482
Costs.....	35
Defense of suits against public officers.....	189
Departmental advertisements.....	576
Deputy collector of customs at San Francisco.....	241
Detention of mail-matter.....	143
Distribution of moieties.....	377
Distribution of prize.....	364
Distribution of the proceeds of forfeitures, &c.....	336

TABLE OF TITLES.

VII

	Page.
District of Columbia	584
District of Columbia—Auditor's certificates	465
District of Columbia bonds	554
District of Columbia 3.65 bonds	445, 544
Drawback on refined sugars	578
Duties on importations	542
Duty of Attorney-General	21
Duty on silk and cotton ribbons	130
Effect of pardon—remission of fine	598
Eight-hour law	37, 45, 128
Employment of counsel for the United States	655
Employment of counsel in naval courts-martial	13
Enlistment of minors in the Army	210
Execution of State tax-laws	199
Expatriation—foreign domicile—citizenship	295
Extradition	281
Fees and costs in prosecutions against seamen	325
Fort Gratiot military reservation	320
Fort Leavenworth military reservation	33
Fort Reading, California	244
Freedmen's Bureau	268
Freedmen's Bureau—case of F. A. Seely	435
Freedmen's Bureau—Generals Howard and Balloch	473
Government Asylum for the Insane	225
Governorship of Arkansas—case of Baxter and Brooks	391
Guano Islands in the Pacific	608
Importation of household effects	386
Imprisonment of convicts of consular courts	522
Indian agent in Alaska	573
Indian country	290
Indian reservations in Nebraska	666
Internal revenue	275, 459
Internal revenue—claims for refund of stamps	513
Internal-revenue collection-districts	215
Internal-revenue stamps	528
Internal-revenue tax on State banks	97
Internal-revenue tax on tobacco	110
International exhibition	503
Introduction of spirituous liquors or wines in Alaska	401
Jurisdiction over national cemeteries	557
Land-grant railroads	428, 663
Legislative assembly of the District of Columbia	1
Legislature of New Mexico	4
Letter-postage	186
Liability of mail-contractors	18

VIII

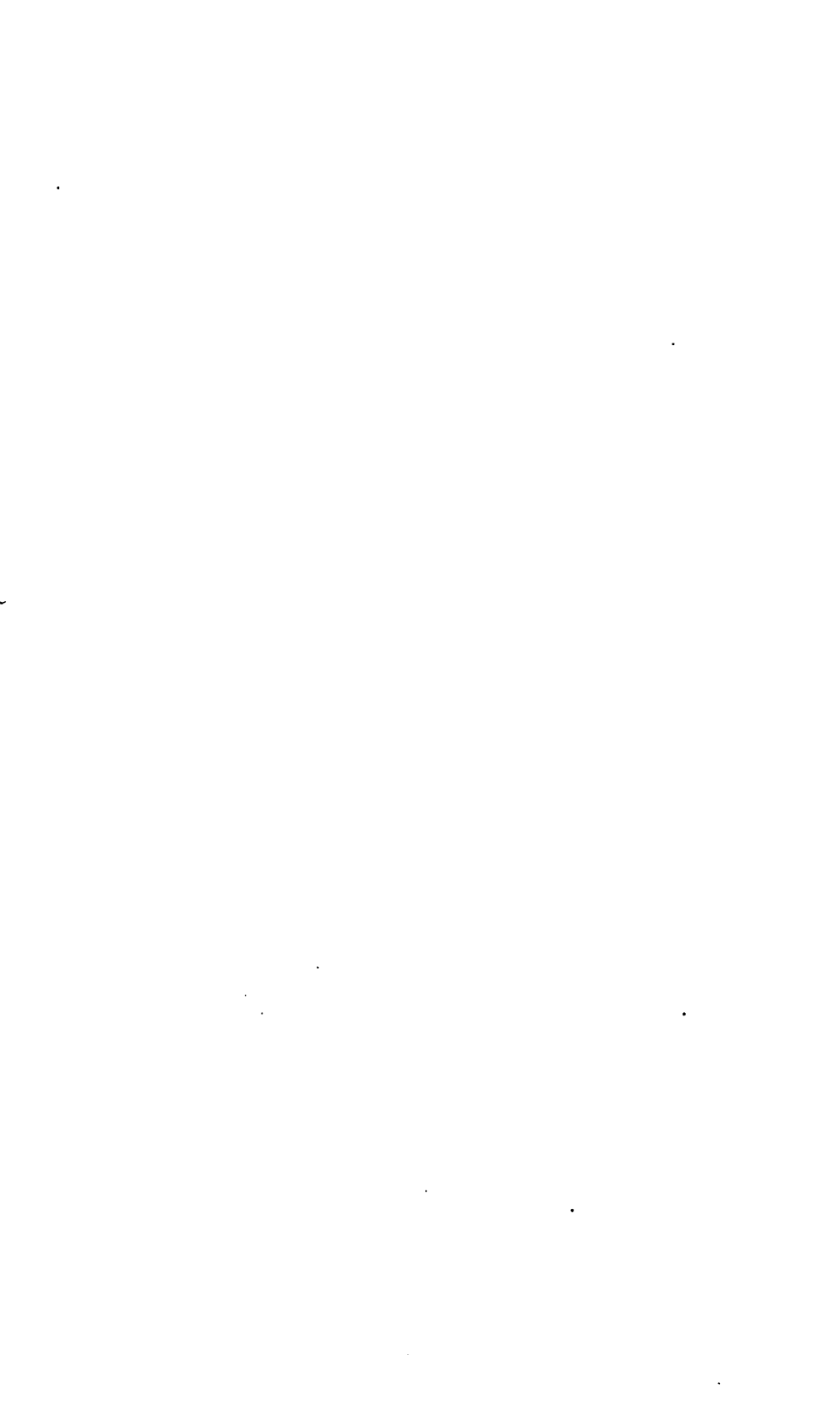
TABLE OF TITLES.

	Page.
Limitations as to trials by court-martial.....	52
Limitations under internal-revenue laws.....	81
Louisville and Portland Canal.....	90
Mail-service.....	585
Mail-transportation.....	56
Members of Congress elect.....	133
Metropolitan Police accommodations.....	127
Mileage.....	590
Military jurisdiction.....	22
Military reservation at Fort Leavenworth.....	135
Mineral lands.....	115
Missouri River, Fort Scott and Gulf Railroad Company.....	69
Mobile and Ohio Railroad Company.....	591
Money-orders.....	119
Moneys paid into United States courts.....	362
National banks.....	414, 456
National cemetery at Grafton.....	27
Navy-pension fund.....	524
New jail for the District of Columbia.....	60
New State, War, and Navy Department building.....	409
Nez Percé reservation—claim of W. G. Langford.....	568
Norse American Line of Steamers.....	468
North German Lloyd Steamship Company.....	530
Ordnance-returns.....	289
Pacific Mail Steamship Company contract.....	674
Pardon for desertion.....	124
Payment of cotton-claims at the Treasury.....	515
Pension agents and agencies.....	147
Pensions.....	94, 220
Police board of the District of Columbia.....	338
Portage land-grant.....	636, 645
Postal cards.....	107
Postal convention with France.....	564
Printing.....	616
Printing drawings of patents.....	58
Printing wooden mail-tags.....	209
Private land-claims in California.....	39, 74
Promotions in the Quartermaster's Department.....	2
Property of deserting seamen.....	520
Purchase at sale under the direct tax-law.....	352
Railroad-bridges across the Mississippi River.....	254
Rancho "Guadalupe".....	601
Rancho "Los Trigos".....	624
Refunding customs-duties.....	559

TABLE OF TITLES.

IX

	Page.
Refund of customs-duties.....	653, 672
Re-imbursement of expenses.....	71
Remission of fines, penalties, and forfeitures.....	454
Remission of forfeitures by the Postmaster-General.....	179
Removal of capital of Montana Territory.....	462
Removal of territorial officers.....	422
Representatives-elect—compensation.....	406
Resignation of office.....	259
Retired pay of Surgeon-General Finley.....	76
Rock Island bridge.....	32
Saint James Roman Catholic mission.....	12
Sea-service in the Navy.....	142
Sea-service of volunteer naval officers.....	358
Sioux City and Pacific Railroad Company.....	375
South and North Alabama Railroad Company.....	617
State banking associations.....	373
Steamers General Meigs and General Burnside.....	84
Steamer Virginus.....	49
Suits and prosecutions for frauds.....	54
Survey of land-claims in Missouri.....	96
Tax upon "surplus or contingent funds".....	643
Telegraph along the Kansas Pacific Railroad.....	313
Telegraphic communications.....	278
Telegraphic messages for the Government.....	123
Temporary appointments in the Army.....	562
Territorial legislature—subsidies.....	191
Testimony of accomplices.....	511
The Chehalis Indian reservation.....	181
The Iowa Railway land-grant.....	157
The Modoc Indian prisoners.....	249
The Virginus.....	340
Tonnage-duties.....	450
Transportation of the mail.....	388
Transportation under the Treaty of Washington.....	310
Traveling-allowances of United States marshals.....	681, 683
Trusses for disabled soldiers.....	72
Union Pacific Railroad bridge at Omaha.....	232
United States mint.....	219
Valuation of foreign coin.....	382
Western Union Telegraph Company.....	173
Wisconsin land-grant—condition subsequent.....	430
Wisconsin Railroad land-grant.....	203
Withdrawal of goods for exportation.....	574



OPINIONS
OF
HON. GEORGE H. WILLIAMS, OF OREGON.

* APPOINTED DECEMBER 14, 1871.

LEGISLATIVE ASSEMBLY OF THE DISTRICT OF COLUMBIA.

By section 5 of the act of February 21, 1871, chap. 62, all sessions of the legislative assembly of the District of Columbia, called as well as regular, are limited in duration to sixty days.

DEPARTMENT OF JUSTICE,
January 15, 1872.

SIR: I have considered the question propounded by the governor of the District of Columbia in his letter to you of to-day, which you have been pleased to refer to me, viz, whether the term of any session of the legislative assembly of the District of Columbia, regular or called, except the first session, can be legally continued beyond the term of sixty days.

Section 5 of the organic act, to which reference is made, provides, "That no session in any one year shall exceed the term of sixty days, except the first session, which may continue one hundred days."

The language of this provision is general, and applies to a called as well as a regular session. I am, therefore, of the opinion that no session of the legislative assembly of

* NOTE.—The commission of Judge Williams, as Attorney-General, is dated December 14, 1871. He did not qualify and enter upon the duties of the office, however, until January 9, 1872, up to which time his predecessor, Mr. Akerman, remained in office.

Promotions in the Quartermaster's Department.

the District can legally continue beyond the term of sixty days.

I have the honor to be, very respectfully, your obedient servant,

GEO. H. WILLIAMS.

THE PRESIDENT.

NOTE.—By the act of June 20, 1874, chap. 337, the law providing for a legislative assembly for the District of Columbia was repealed.

PROMOTIONS IN THE QUARTERMASTER'S DEPARTMENT.

Vacancies created in the Quartermaster's Department by the act of July 28, 1866, chap. 299, from above the rank of assistant quartermaster to that of colonel, were required to be filled by promotion according to seniority, except in case of disability or other incompetency.

The Army Regulations of 1863, in regard to promotions in the Army, have, by virtue of section 37 of the said act, the force of law.

The words "all vacancies," used therein, cannot be rightfully construed to apply to vacancies occurring in a particular way only, but they include a vacancy that arises on the creation of a new office as well as one that happens by the resignation or death of an incumbent.

DEPARTMENT OF JUSTICE,

January 22, 1872.

SIR: I have the honor to acknowledge the receipt of your letter of the 12th instant, inclosing a memorial from certain persons to the Senate of the United States; and I understand that you submit for my opinion the following question: Are vacancies in the Quartermaster's Department, above the rank of assistant quartermaster to that of colonel, created by the act of July 28, 1866, (14 Stat., 334,) to be filled by promotion according to seniority, or at the option of the President by and with the advice and consent of the Senate?

Section 1 of the act of March 3, 1851, (9 Stat., 618,) provides, "That all promotions in the staff department, or corps, shall be made as in other corps of the Army."

Paragraph 19 of the Army Regulations (edition of 1863) provides, that "All vacancies in the established regiments and corps to the rank of colonel shall be filled by promotion according to seniority, except in case of disability or other incompetency."

Promotions in the Quartermaster's Department.

Section 13 of the act of July 28, 1866, above referred to, enacts as follows: "That the Quartermaster's Department of the Army shall hereafter consist of one Quartermaster-General, with the rank, pay, and emoluments of brigadier-general; six assistant quartermasters-general, with the rank, pay, and emoluments of colonels of cavalry; ten deputy quartermasters-general, with the rank, pay, and emoluments of lieutenant-colonels of cavalry; fifteen quartermasters, with the rank, pay, and emoluments of majors of cavalry; and forty-four assistant quartermasters, with the rank, pay, and emoluments of captains of cavalry; and the vacancies hereby created in the grade of assistant quartermaster shall be filled by selection from among the persons who have rendered meritorious services as assistant quartermasters of volunteers during two years of the war," &c.

Section 37 of the same act provides that the existing regulations shall remain in force, or until Congress shall have acted on a report from the Secretary of War which is provided for in said act. No action has been taken by Congress in reference to any such report, and therefore the regulations referred to, by virtue of said section 37, have the force of law.

Putting section 1 of the act of March 3, 1851, and the 19th paragraph of the Army Regulations, above cited, together, and they declare, in effect, that "All vacancies in the Quartermaster's Department to the rank of colonel shall be filled by promotion according to seniority, except in case of disability or other incompetency." No act of Congress can be found changing this regulation as to appointments. The only question, therefore, is as to whether or not the words "all vacancies" include a vacancy arising from the creation of an office.

When an act of Congress makes a new office, it is usual and proper to say that it is vacant, until some one enters into the exercise of its functions. "All vacancies" is a very comprehensive form of expression, and cannot be rightfully construed to exclude a class of vacancies occurring in a particular way. Vacancies arise when persons holding office die or resign, and they also arise when new offices are created; and while there is nothing in the letter, there seems to be noth-

Legislature of New Mexico.

ing in the spirit of the law to make any difference in the mode of filling both kinds of vacancies in the same way.

This view is fortified by the language of the 13th section of the act in question, which says: "And all vacancies hereby created in the grade of assistant quartermaster shall be filled," &c. The word "vacancies" is evidently used here to indicate as well offices coming into existence with the act as those vacated by promotion. Express provision is made that the vacancies in this grade shall be filled by selection from the volunteer force instead of the Regular Army; but the word also contains an implication that vacancies in the higher grades to the rank of colonel are to be filled by promotion.

I can find no grounds in the acts of Congress or regulations of the Army touching this subject for holding that the word "all," in the regulation referred to, means "accidental;" and I am, therefore, of the opinion that the vacancies in the Quartermaster's Department, above assistant quartermaster to the rank of colonel, created by said act of July 28, 1866, are to be filled by promotion according to seniority, and not at the option of the President and Senate.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,
Secretary of War.

LEGISLATURE OF NEW MEXICO.

Where two bodies claimed to be the house of representatives of the Territory of New Mexico, and the secretary of the Territory desired instructions as to which of these bodies he should pay: *Advised* that, in view of the imperfect statement of facts furnished, nothing be done which might be regarded as a recognition of the legality of either of the bodies referred to, and that the secretary be informed that no instructions such as he desires can be given without more complete information.

DEPARTMENT OF JUSTICE,
January 31, 1872.

SIR: I have the honor to acknowledge the receipt of your communication of the 29th instant, inclosing what purports to be a journal of the house of representatives of New Mex-

Legislature of New Mexico.

ico, with a telegram from the secretary of that Territory, representing that two bodies claim to be such house, and asking for instructions as to which he shall pay.

Nothing appears to have occurred to raise such a question prior to the 5th instant. On that day the house voted that three of the sitting members, to wit: Juan Antonio Sanchez, Buenaventura Lobato, and Antonio F. Gallegos were not entitled to the seats they were holding, and José Cordova, Mateo Romeo, and Juan B. Gonzales, contestants, were entitled to such seats; and also voted that Francisco Antonio Montoya was entitled to a seat, for which a certificate of election had been given to one Antonio de Jesus Sismeros, deceased. On Saturday the 6th, Monday the 8th, and Tuesday the 9th the house met and adjourned, but on the 10th, after some unimportant proceedings, the house divided, eleven members, including the speaker, withdrawing from the hall where the house was in session and eleven remaining. According to the so-called journal submitted to me, the speaker on that day, without any vote of the house, declared it adjourned until the next day, and with ten other members withdrew; whereupon the eleven remaining members proceeded to elect a speaker, sergeant-at-arms, second clerk, engrossing and enrolling clerks, and interpreters, after declaring those offices vacant, on the ground that the persons previously chosen thereto had left with the speaker and his ten associates and abandoned their duty. The speaker so elected forthwith issued his warrant to the new sergeant-at-arms for the arrest of the absent members, three of whom were brought in, protesting against the legality of the proceedings, and were called upon to explain their conduct, pending which the oath of office was administered by the acting speaker to said Cordova, Romeo, Gonzales, and Montoya, and they took their seats. Then the journal for the 5th, 6th, 8th, and 9th days of the session was read and approved. Nothing further appears as to the proceedings of this branch of the body.

I am satisfied that the paper placed in my hands, called a journal, is an imperfect and one-sided statement of what transpired between and including the 5th and the 10th instant, and therefore it is an unsafe basis for any opinion as

Legislature of New Mexico.

to the validity of the proceedings of which it professes to be a record. For example: it states in one place that the ayes and noes were ordered, but, instead of giving the vote or the names of those voting, it recites what was said and done when the name of one member was called; so that it is impossible to tell from it how many were present and voting at that time.

I have nothing before me to show which part of the house was recognized by the council, the co-ordinate branch of the legislative assembly, or by the governor or judiciary of the Territory. I have no information as to the proceedings of that part of the house which retired on the 10th instant with the speaker. Twenty-six members constitute the house of representatives, and therefore fourteen are necessary to constitute a quorum for the transaction of business. I think it quite probable that one division of the house has been acting altogether without a quorum, and that the other division has been acting for at least part of the time in the same way.

I do not consider it advisable to make any decision which may be construed into a recognition of either branch of the house as a legal body under the organic act of the Territory, upon what appears to me to be a defective and prejudiced statement of five days' proceedings of one branch. It is impossible to determine what effect the proceedings of the house, or either part of it, subsequent to the 10th instant, (when the so-called journal closes,) had upon what transpired prior to and upon that day.

I therefore respectfully suggest that the secretary of the Territory be advised that no instructions such as he desires can be given without further and fuller information as to the action of the two bodies claiming to be the house of representatives for the Territory.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. HAMILTON FISH,
Secretary of State.

Bonds of Consuls.

BONDS OF CONSULS.

A consul's bond, given under the 13th section of the act of August 18, 1856, chap. 127, speaks and takes effect (not from its date, but) from the time of its approval by the Secretary of State.

Accordingly, where an appointee to a consulship was commissioned on the 18th of January, and his bond, though dated on the 13th of same month, was not approved by the Secretary until the 27th: *Held* that the bond was valid and sufficient under said act.

DEPARTMENT OF JUSTICE,

February 1, 1872.

SIR: I have to acknowledge the receipt of your communication of the 29th ultimo, inclosing the official bond of John Wilson as consul at Brussels, and asking whether or not it is of legal validity.

It appears that Mr. Wilson was nominated for said office on the 12th of last December; that he was confirmed by the Senate on the 18th ultimo, on which date his commission issued; that said bond bears date the 13th ultimo, and that it was approved by you, as appears from a written statement in the margin thereof, on the 27th ultimo.

By the 13th section of the act of August 18, 1856, (11 Stat., 56,) every consul is required, before he receives his commission or enters upon the duties of his office, to give a bond to the United States, with such sureties as the Secretary of State shall approve; and according to the principles laid down in the case of the *United States vs. L. Barclay*, (19 How., 73,) a bond given under that provision must be considered to speak and to take effect, not from the day of its date, but from the date upon which it was approved by the Secretary of State.

I am, therefore, of the opinion that the bond, if approved at the date indicated upon its margin, is a good and valid bond.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. HAMILTON FISH,
Secretary of State.

Compromise of Internal-Revenue Cases.

COMPROMISE OF INTERNAL-REVENUE CASES.

The Commissioner of Internal Revenue is not authorized by section 102 of the act of July 20, 1868, chap. 186, to compromise cases in which internal-revenue officers are charged with embezzlement under the 16th section of the act of August 6, 1846, chap. 90, the provisions whereof are made applicable to such officers by the internal-revenue law of June 30, 1864, chap. 173.

The words "all cases arising under the internal-revenue laws," in the former section, mean those cases wherein the tax-payer, and not the tax-collector, is the party seeking a compromise.

DEPARTMENT OF JUSTICE,
February 7, 1872.

SIR: I have the honor to acknowledge the receipt of your communication of the 11th instant, in which you submit for my opinion the following question: "Is the Commissioner of Internal Revenue authorized, with the advice and recommendation of the other officers whose advice or recommendation is required by section 102 of the act of July 20, 1868, (15 Stat., 166,) to compromise under that section, in case of internal-revenue officers, the offense declared to be embezzlement by section 16 of the act of August 6, 1846, (9 Stat., 63,) the provisions of which are, by section 51 of the act of June 30, 1864, (13 Stat., 241,) made applicable to 'all officers of internal revenue charged with the safe-keeping, transfer, or disbursement of the public money arising therefrom, and to all other persons having actual charge, custody, or control of moneys or accounts arising from the administration of the internal revenue.'"

Section 102, above referred to, is as follows: "That in all cases arising under the internal-revenue laws, where, instead of commencing or proceeding with a case, in court, it may appear to the Commissioner of Internal Revenue to be for the interest of the United States to compromise the same, he is empowered and authorized to make such compromise, with the advice and consent of the Secretary of the Treasury; and in every case where a compromise is made, there shall be placed on file, in the office of the Commissioner, the opinion of the Solicitor of Internal Revenue, or officer acting as such, with

Compromise of Internal-Revenue Cases.

his reasons therefor, together with a statement of the amount of tax assessed, the amount of additional tax or penalty imposed by law, in consequence of the neglect or delinquency of the person against whom the tax is assessed, and the amount actually paid in accordance with the terms of the compromise; but no such compromise shall be made of any case after a suit or proceeding in court has been commenced, without the recommendation also of the Attorney-General: *Provided*, That it shall be lawful for the court, at any stage of such suit or criminal proceedings, to continue the same for good cause shown on motion of the district attorney."

I think a fair construction of the language of this section furnishes, in itself, a negative answer to your question. The words "all cases arising under the internal-revenue laws," upon which stress is placed, are explained by the latter clause of the section. When a compromise is made, the Solicitor of Internal Revenue, or officer acting as such, is to place on file his reasons therefor, "together with a statement of the amount of tax assessed, the amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and the amount actually paid in accordance with the terms of the compromise." This clearly implies a compromise with the tax-payer, and not with the collector of taxes.

To say nothing of the improbability that Congress would confer upon the Commissioner the power to compound a felony with his subordinates, the conclusion, as it appears to me, that he has no such power, is fully warranted by the explanations and limitations contained in section 102 of the act of July 20, 1868, which is the only pretended ground for the exercise of any such authority.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. GEO. S. BOUTWELL,

Secretary of the Treasury.

Appointments in the Medical Department.

APPOINTMENTS IN THE MEDICAL DEPARTMENT.

By section 17 of the act of July 28, 1866, chap. 299, there were allowed in the Medical Department of the Army one chief medical purveyor and four assistant medical purveyors, each with the rank and pay of a lieutenant-colonel of cavalry; and the 6th section of the act of March 3, 1869, chap. 124, prohibited any new appointments or promotions in that department until otherwise directed by law. A vacancy in the office of chief medical purveyor having occurred subsequent to the date of the last-mentioned act: *Held* that the provisions thereof forbid the filling of the vacancy by the appointment of one of the assistant medical purveyors thereto; that such an appointment would constitute a promotion, in view of the relative superiority of the position, and come within the statute, though it involved no increase of pay.

DEPARTMENT OF JUSTICE,

February 24, 1872.

SIR: I have the honor to acknowledge the receipt of your communication of the 29th ultimo, of which the following is a copy:

"Section 17 of the act of July 28, 1866, (14 Stat., 334, 335,) provides, 'That the Medical Department of the Army shall hereafter consist of (among others) * * * one chief medical purveyor and four assistant medical purveyors, with the rank, pay, and emoluments of lieutenant-colonels of cavalry,' &c.

"There now exists, on account of the retirement of the officer formerly filling it, a vacancy in the office of chief medical purveyor.

"The 6th section of the act of March 3, 1869, (15 Stat., 318,) provides, 'That, until otherwise directed by law, there shall be no *new appointments* and no *promotions* in the Adjutant-General's Department * * * and in the Medical Department.'

"The operation of this section of the act of March 3, 1869, has been heretofore supposed by this Department to extend to this vacancy of chief medical purveyor, prohibiting the President from nominating to the Senate a person to fill it; but the inclosed memorandum, prepared by one of the assistant medical purveyors, which assumes that the President has power to select any one of the assistant medical

Appointments in the Medical Department.

purveyors, now in service, to fill this position, upon nomination and confirmation by the Senate, has caused some doubt to arise as to the proper construction of the law as applying to the vacant office in question; and I therefore respectfully submit the papers herewith, with a request for an early opinion as to the construction of the law involved, and the power of the President to fill said office in the manner indicated."

To show that the construction given by your Department, as above indicated, to section 6 of the act of March 3, 1869, is erroneous, it is argued that to appoint an assistant chief medical purveyor is not a promotion, because the change does not confer any additional Army rank or pay.

That the office of chief medical purveyor is a higher and different office from that of assistant medical purveyor, is evident not only from the different modes in which those two offices are designated, but from the fact that an assistant cannot be made chief without a new commission from the President, after confirmation by the Senate. When an assistant is made chief medical purveyor, his Army rank or pay may not be affected, but it is certainly a promotion in the Medical Department. He is invested with new power, and the remaining assistants become subject to his jurisdiction and authority, as the head of that branch of the medical service. To say that the chief in any Department, Bureau, or branch of the public service is not higher in office or position than his assistant, is almost a contradiction in terms. When one holding a secondary or subordinate position in any Bureau of the Government is commissioned as chief of that Bureau, it is impossible to say that he is not promoted, though there may be nothing more substantial than new honors in his advancement.

There is some room for arguing that the words "new appointments" in said section mean appointments by which additions are made to the departments therein named; but they may also fairly be interpreted to include all appointments. When the President, by and with the advice and consent of the Senate, appoints any one to fill a vacancy existing in the office of the chief medical purveyor, it is difficult to say that there is not a new appointment in the

Saint James Roman Catholic Mission.

Medical Department. It may be that these words were used with the idea of reducing expenses, with which the promotion of an assistant to the office of chief medical purveyor is not inconsistent; but it is unsafe to refine away the natural and fair import of words in a statute by reference to some supposed intention with which they were employed.

I am forced, by giving to said section 6 of the act of March 3, 1869, a fair and reasonable construction, to conclude that no vacancies existing at the time of the passage of said act, or that have since or may hereafter occur in the departments therein named, can be filled until it pleases Congress otherwise to provide. I hold, therefore, that no appointment can be legally made to fill the existing vacancy in the office of chief medical purveyor.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,

Secretary of War.

SAINT JAMES ROMAN CATHOLIC MISSION.

It is within the competency of the Land Department of the Government to determine whether the Roman Catholic Mission of Saint James has acquired title to the land claimed by the latter at Fort Vancouver, Washington Territory, under the 1st section of the act of August 14, 1848, chap. 177.

DEPARTMENT OF JUSTICE,

March 2, 1872.

SIR: I herewith return the opinion of Assistant Attorney-General Smith upon the claim of the Roman Catholic Mission of Saint James for 640 acres of land at Vancouver, in Washington Territory.

I have not examined the questions of fact discussed and decided by him, and upon them, therefore, express no opinion. But I have examined and approve his views to the effect that the Land Department of the Government has jurisdiction to determine whether or not the said Catholic Mission has acquired title to 640 acres, or any other quantity, of land at Vancouver, in Washington Territory, under and by virtue of section 1 of the act of August 14, 1848, entitled "An act to

Employment of Counsel in Naval Courts-Martial.

establish the territorial government of Oregon." What effect the decision is to have, if judicially questioned, the courts will decide for themselves.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. COLUMBUS DELANO,

Secretary of the Interior.

EMPLOYMENT OF COUNSEL IN NAVAL COURTS-MARTIAL.

The head of the Navy Department cannot, consistently with the provisions of section 17 of the act of June 22, 1870, chap. 150, employ an attorney or counselor at law to conduct proceedings before a naval court-martial. Opinion of Attorney-General Akerman on same subject (13 Opin., 515) examined and concurred in.

DEPARTMENT OF JUSTICE,

March 4, 1872.

SIR: I have the honor to acknowledge the receipt of your communication of the 29th ultimo, containing a copy of the opinion of my predecessor, of date August 25, 1871, (see 13 Opin., 515,) to the effect that the Navy Department is not at liberty to employ an attorney or counselor at law to conduct the proceedings by court-martial against Rear-Admirals Godon and Davis, as provided for in a resolution of the House of Representatives. I am asked to review this opinion.

Section 17 of the act of June 22, 1870, entitled "An act to establish the Department of Justice," provides as follows: "That it shall not be lawful for the Secretary of either of the Executive Departments to employ attorneys or counsel at the expense of the United States, but such Departments, when in need of counsel or advice, shall call upon the Department of Justice, the officers of which shall attend to the same; and no counsel or attorney fee shall hereafter be allowed to any person or persons, besides the respective district attorneys and assistant district attorneys, for services in such capacity to the United States or any branch or Department of the Government thereof."

My predecessor's opinion appears to be little more than an amplification of the plain and comprehensive language of this

 Clothing for Invalid Soldiers.

statute, and I discover no grounds upon which to question its correctness.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. GEO. M. ROBESON,

Secretary of the Navy.

CLOTHING FOR INVALID SOLDIERS.

The act of March 22, 1867, chap. 4, authorizing the Secretary of War to furnish each invalid soldier who is an inmate of any regularly-constituted soldiers' home with one complete suit of clothing, does not extend to those invalid soldiers who are inmates of the National Asylum for Disabled Volunteers or its branches.

The clothing thus authorized to be distributed is required, by the terms of the act, to be taken from the "stock on hand," at the time of its passage, and the managers of any such soldiers' home may make requisitions therefor as long as that particular stock lasts, but no longer.

DEPARTMENT OF JUSTICE,

March 14, 1872.

SIR: I have the honor to acknowledge the receipt of your communication of the 20th ultimo, in which you request my interpretation of the following act of Congress:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of War be, and he is hereby, authorized and required to furnish one complete suit of clothing to each invalid soldier who is an inmate of any regularly-constituted 'soldiers home' in the United States, out of the stock on hand in the Quartermaster's Department.

"SEC. 2. And be it further enacted, That such clothing shall be delivered to the managers of such institutions upon their requisition therefor, accompanied with such certificates as to numbers and condition as the Secretary of War may prescribe." Approved March 22, 1867, (15 Stat., 1.)

On the 20th of last January, the president of the National Asylum for Disabled Volunteer Soldiers made a requisition upon the Secretary of War for an assortment of complete

Clothing for Invalid Soldiers.

suits of clothing, to be furnished by the Quartermaster-General to the inmates of the various branches of said asylum, in which requisition it is stated that the asylum had already received from the War Department five hundred suits of such clothing; and the question submitted, as I understand it, is whether or not the War Department is bound by said act to comply with said requisition.

I am met at the threshold of the inquiry by the suggestion that the National Asylum for Disabled Volunteer Soldiers is not one of the institutions described in said act as a regularly-constituted "soldiers' home." Referring to the act of March 10, 1866, (14 Stat., 10,) by which said asylum was created, and to the subsequent amendments of that act, I do not find that said asylum and its branches are anywhere described or referred to as "soldiers' homes;" but in a joint resolution approved June 8, 1868, (15 Stat., 253,) "to supply books and public documents to the National Asylum," provision is made for a "soldiers' home," as though it was not a part of the National Asylum.

When the act under consideration was before Congress, it was stated and understood that it was to provide for cases where there are "asylums established by States and by the local communities." (Congressional Globe, 1st session 40th Congress, vol. 77, pp. 199, 200.)

Section 2 of another act of March 22, 1867, (15 Stat., 21,) authorizes the Secretary of War to sell to the National Asylum "such surplus clothing, quartermaster's and medical stores as he may deem expedient, at first prices," and funds are provided with which to make such purchases.

On the same day, therefore, provision was made by Congress, but in different acts, for the National Asylum for Disabled Volunteers, and for "soldiers' homes." To the former, clothing and stores, as aforesaid, were to be sold by the War Department at first prices; and to the inmates of the latter, one complete suit of clothing was to be given, out of the stock on hand in the Quartermaster's Department.

Accompanying your letter is the opinion of the Judge-Advocate-General, in which he holds that the act above quoted applies exclusively to those who were inmates of "soldiers' homes" at the time the act was passed, and to the stock of

Clothing for Invalid Soldiers.

clothing then on hand in the Quartermaster's Department. This view of the subject is controverted upon the ground that the words "is an inmate," in the statute, upon which stress is put by the Judge-Advocate-General, mean an inmate at any time when requisition is made, and not an inmate only at the date of the act. When this act passed the House it required the Secretary of War to furnish, "annually," one complete suit of clothing to each inmate, but the word "annually" was stricken out in the Senate. Evidently, therefore, the words "is an inmate" were inserted in the bill with reference to future as well as present time, and the only effect of striking out the word "annually" was to provide that each inmate should not have a new suit every year.

I do not find the limitation in this statute so much in its expression as to time, as in the description of the property from which the gratuities are to be made. When the war closed, the War Department, as it is understood, had a large quantity of surplus clothing on hand, and the object of this act, as it seems to me, was to give to each inmate of a "soldiers' home" one suit out of that particular stock. Donations were to be made from that specific clothing. Like an act providing for payments to individuals out of a certain appropriation of money, as long as the appropriation lasts the payments can be made. When that is exhausted they must cease.

My opinion is that, under the act in question, each invalid soldier who is an inmate of a regularly-constituted "soldiers' home" is entitled to one complete suit of clothing out of the "stock on hand" at the time said act was passed, and that the managers of such an institution have the right to make requisition accordingly, as long as the said "stock on hand" lasts, and no longer. But I hold that the National Asylum and its branches are not entitled to the benefits of said act.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,
Secretary of War.

Attorney-General and Congressional Committees.

ATTORNEY-GENERAL AND CONGRESSIONAL COMMITTEES.

A committee of the House of Representatives having referred the papers in certain claims to the Attorney-General, with a request for an official opinion thereon, the papers were returned unaccompanied by an opinion, the Attorney-General holding (in accordance with the views of several of his predecessors on the same point) that it is not within his province to advise committees of Congress upon questions of law occurring in matters before them.

DEPARTMENT OF JUSTICE,
March 22, 1872.

SIR: I have the honor to acknowledge the receipt of your letter of the 9th instant, in which you say you have been instructed by the Committee on Foreign Affairs to refer the papers touching the claims of several insurance companies, growing out of the loss of the bark Caldera and cargo in Chinese waters, to me for an official opinion, if consistent with my official duties.

I herewith respectfully return the papers, and have to say that several of my predecessors, including Attorneys-General Wirt, Taney, Crittenden, Bates, and Evarts, have decided that it is not only not the duty of the Attorney-General, but that he has no right to give his official opinion upon similar applications. (1 Opin., 335; 2 Opin., 499; 5 Opin., 561; 10 Opin., 164; 12 Opin., 544.) Reference is also made to the act of June 22, 1870, entitled "An act to establish the Department of Justice," as defining the duties of the Attorney-General as head of that Department.

It is, perhaps, unnecessary to say that this Department is now charged by law with all the labor that it can by the use of diligence perform, and to add to this the preparation of opinions upon calls by the several committees of Congress upon the questions of law which may arise in their deliberations, would be to overwhelm the departmental business.

I beg your honorable committee to understand that I am disposed to treat their wishes with the utmost respect, but

Liability of Mail-Contractors.

from a sense of official obligation I do not feel at liberty to comply with their request as contained in your letter.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. N. P. BANKS,

*Chairman of Committee on Foreign Affairs,
House of Representatives.*

LIABILITY OF MAIL-CONTRACTORS.

A mail-contractor, after executing separate contracts in due form to convey the mails on four different routes, entered upon and continued the performance of service on two of them, but on the other two he failed to do any service, and the Post-Office Department was compelled to employ other parties to carry the mails on the last-mentioned routes at an increased rate of compensation, the difference being charged as usual to the first contractor. For administrative purposes merely, and not with any intention to release the first contractor from liability, an order was made to annul the two contracts which he had failed to perform: *Held* that, under the circumstances stated, such contractor was not thereby discharged from any claim growing out of those contracts which the United States would otherwise have against him.

DEPARTMENT OF JUSTICE,

March 23, 1872.

SIR: I have the honor to acknowledge the receipt of your communication of the 5th instant, in which you ask my opinion upon the following:

"On the 20th of April, 1870, Henry C. Foster, of Frederickton, Missouri, was accepted as contractor for conveying the mails on four routes in that State, from July 1, 1870, to June 30, 1874, (under advertisement dated October 30, 1869,) at an aggregate compensation of \$2,355 per annum. He executed contracts in due form for all the routes, and on two of them he began the service and continued in its performance. On the other two routes he has failed to do any service, and the Department was compelled to engage other parties, at an increased rate of pay, charging the difference, as is usual in such cases, to the failing contractor.

"As the contracts with Foster had been officially reported

Liability of Mail-Contractors.

to the Auditor, as required by the 11th section of the act of Congress 'to change the organization of the Post-Office Department,' &c., approved July 2, 1836, it became necessary, before making the Auditor acquainted with the new service, to withdraw or render nugatory the former contract; and this was done by an order, duly recorded, in this form: 'Annul contract of Henry C. Foster from July 1, 1870, he having failed to perform service.'

"By subsequent orders Foster was made chargeable with the difference between the rate of pay under his contracts and the increased amount paid and to be paid to other parties. The effect of these orders is to offset the pay accruing to this contractor for services actually rendered, and in order to remove this difficulty the attorney contends, 'that the annulment of the contract from July 1, 1870, releases the contractor and his sureties from all liability on account of said routes', and he asks 'that he be allowed to settle his accounts with the Department for service on other routes on their respective merits.'

"The order to annul was to render inoperative contracts officially in the hands of the Auditor, and which could not be literally withdrawn, and with no intention to release the contractor and his sureties from their legal liabilities; but, if such is the technical effect of orders so drawn, it may be useful, for the guidance of the Department in its future action, that the fact should be authoritatively known. The power to annul the contract for repeated failures is reserved to the Postmaster-General in all contracts for mail-service."

I find no difficulty in reaching the conclusion, upon this statement, that the contractor is not discharged from his obligations under the contracts by the above-described indorsements made upon them. Those indorsements take their effect from the intent with which they were made. They were not put upon the contracts, as it appears, to affect any claim of the United States against the contractor, but for the convenience of the Department, and by way of direction to one of its officers in the transaction of business. The circumstances explain the acts.

My opinion, therefore, is that the contractor and his sureties are not released from any claim that the United States would

 Applications for Pardon.

otherwise have upon said contracts, by the marginal indorsement placed thereon by the Department.

I make no decision as to whether or not the Post-Office Department has a legal right to offset the claims of the United States upon the contracts not fulfilled against the claim of the contractor for services rendered in the performance of the other contracts.

Very respectfully,

GEO. H. WILLIAMS.

Hon. JNO. A. J. CRESWELL,

Postmaster-General.

 APPLICATIONS FOR PARDON.

Applications for pardon are addressed to the President, who may act on them upon his own examination simply, or, before acting thereon, may refer them to any of the Executive Departments for advice.

An application having been, with that view, referred by the President to the Secretary of War, and the latter having afterward submitted the same to the Attorney-General for his opinion thereon, the Attorney-General declined to give an opinion, on the ground that to do so would be merely to advise the Secretary as to what he should advise the President.

DEPARTMENT OF JUSTICE,

March 23, 1872.

SIR: I have the honor to acknowledge the receipt of your letter of the 4th instant, transmitting, with accompanying papers, the application of Richard Reynolds, a prisoner confined in the penitentiary at Jefferson City, Missouri, for a pardon.

I herewith respectfully return the papers, and have to say that applications for pardon are addressed to the President of the United States, who may decide upon an application of that kind upon his own examination, and may refer the papers to any of the Departments for advice upon the subject. With this view it seems he has referred the papers in the case of Reynolds to the War Department. I do not recognize the right of that Department to call upon me for an opinion upon the merit of the application, as that would be simply advising

Duty of Attorney-General.

the Secretary of War as to what he should advise the President.

Moreover, the application for pardon presents altogether a question of fact, upon which the Attorney-General is not authorized to give official opinions to any of the other Departments. This has been repeatedly decided by my predecessors, (5 Opin., 626; 7 Opin., 491; 10 Opin., 267; 12 Opin., 206.)

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,

Secretary of War.

DUTY OF ATTORNEY-GENERAL.

The act of June 22, 1870, chap. 150, establishing the Department of Justice, made no change in the law as to the duty of the Attorney-General in giving official opinions, according to which, as it has been repeatedly held, he is authorized to give an opinion upon a question of law only on the submission thereof by the President or by the head of an Executive Department.

The Assistant Attorney-General attached to the Interior Department having prepared an opinion upon a case previously referred to him by the Secretary of the Interior for examination, and having submitted the same to the Attorney-General for approval: *Held* that the approval or disapproval of the said opinion by the Attorney-General would in effect be giving his official opinion where it is not called for by the President or by the head of a Department, and, therefore, where it is not authorized by law to be given.

DEPARTMENT OF JUSTICE,

March 26, 1872.

SIR: I have received your three letters dated, respectively, January 31, February 9, and March 15, 1872, inclosing three opinions, one touching the claim of the Atlantic and Pacific Railroad Company for indemnity-lands; one in the case of Hans Scheevrin against the Western Pacific Railroad Company; and the other relating to the Creek orphans, which I herewith return without any action thereon by me.

I find that my predecessors in office have made numerous decisions to the effect that the Attorney-General is only authorized to give his official opinion upon a question of law

Military Jurisdiction.

submitted to him for that purpose by the President or the head of one of the Executive Departments. I do not think that the act "to establish the Department of Justice" (16 Stat., 162) changes his rights or duties in respect to his official opinions. I cannot approve or disapprove the inclosed opinions without adjudicating the questions of fact in the cases upon which you seem to have passed, as well as the questions of law, and without giving an official opinion where it is not called for by the President or head of any Department, or indeed by any one outside of the Department of Justice.

You will, therefore, as to any matters referred to you by the Secretary of the Interior, report your action thereon directly to him; and if, in his judgment, in such or any other cases, the official opinion of the Attorney-General is desired upon any question of law, it will be cheerfully given upon his request therefor, accompanied by a statement of the facts out of which the legal question arises.

Very respectfully,

GEO. H. WILLIAMS.

WALTER H. SMITH, Esq.,
Assistant Attorney-General.

MILITARY JURISDICTION.

Civilian employ es serving with the Army, in the Indian country, during offensive or defensive operations against the Indians, are subject to military jurisdiction and trial by court-martial, under the provisions of the 60th Article of War, (2 Stat., 366.)

DEPARTMENT OF JUSTICE,

April 1, 1872.

SIR: I have the honor to acknowledge the receipt of your letter of the 19th instant, in which you propound for my official opinion the following inquiry: "Are civil employ es of the War Department, serving with the military forces of the United States in the Indian country under the circumstances described in the accompanying communication of the commanding officer of Fort Hays, Kansas, in view of the 60th

Military Jurisdiction.

Article of War, amenable to military jurisdiction and trial by court-martial?"

Substantially the following are the circumstances referred to: Serving with troops in the Indian country, at posts and camps in Kansas, Colorado, New Mexico, and the Indian Territory, where, as at Camp Supply and Fort Sill, defensive earthworks are deemed necessary and have been built by the troops; where within twelve months several soldiers have been killed by hostile Indians; where lookouts are kept posted at all times, and other precautions are constantly deemed necessary; at Fort Larned, where within the past two months soldiers near the fort were killed or wounded by hostile Indians; and at Fort Hays, where some seven picket-guard stations are kept upon the neighboring line of the Kansas Pacific Railway to protect it from Indians, and where Indians are believed at all times to be in a semi-hostile attitude, as they are all over the interior country occupied by troops, between the Mississippi Valley and the Pacific Ocean.

Article 60 referred to is as follows: "All sutlers and retainers to the camp, and all persons whatsoever, serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war," (2 Stat., 366.)

To determine when an army is "in the field," is to decide the question raised. These words imply military operations with a view to an enemy. Hostilities with Indians seem to be as much within their meaning as any other kind of warfare. To enable the officers of an army to preserve good order and discipline is the object of this article, and these may be as necessary in the face of hostile savages as in front of any other enemy. When an army is engaged in offensive or defensive operations, I think it safe to say that it is an army "in the field."

To decide exactly where the boundary-line runs between civil and military jurisdiction, as to the civilians attached to an army, is difficult; but it is quite evident that they are within military jurisdiction, as provided for in said article, when their treachery, defection, or insubordination might endanger or embarrass the army to which they belong in its operations against what is known in military phrase as "an

Claim for Damages for Breach of Contract.

enemy." Possibly the fact that troops are found in a region of country chiefly inhabited by Indians, and remote from the exercise of civil authority, may enter into the description of "an army in the field." Persons who attach themselves to an army going upon an expedition against hostile Indians may be understood as agreeing that they will submit themselves for the time being to military control.

I am, therefore, of the opinion that, under the circumstances as above set forth, persons serving with the Army are subject to orders according to the rules and discipline of war.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,
Secretary of War.

CLAIM FOR DAMAGES FOR BREACH OF CONTRACT.

During the late rebellion, T. & Co. contracted with a quartermaster to deliver one thousand mules, at a stated price for each; the quartermaster accepted and paid for twenty-four of the mules, but, deeming a further supply not needed for the service, gave notice to the contractors, who were ready to perform the contract, that he would receive no more mules under the same. The contractors claim from the Government the difference between the expense, in time and money, incurred by them for the performance of the contract, and the value of the mules declined to be received thereunder by the quartermaster when the notice was given as aforesaid. *Held* that the claim, being one for unliquidated damages, cannot be entertained by the accounting-officers of the Treasury.

DEPARTMENT OF JUSTICE,
April 6, 1872.

SIR: I have the honor to acknowledge the receipt of your letter of 28th ultimo, asking my opinion as to whether or not an executive officer of the Government has authority to pay the claim described in the following statement, which you submit:

"Messrs. John A. Thompson & Co., of Kentucky, have pending in this Department a claim growing out of an alleged contract with the Government for the delivery by them of one thousand mules to the quartermaster at Nashville, Tennessee, for prices stated. It is alleged by them that said

Claim for Damages for Breach of Contract.

quartermaster accepted and paid, according to contract, for twenty-four of these mules; but the fall of Richmond and the collapse of the rebellion occurring about the time, he notified the claimants that he would receive no more mules on the contract. The claimants allege their readiness to perform the contract at the time they were so notified. They now claim to be paid 'the difference between the expense incurred, in time and money, in the performance of the contract and the value of the mules when they were rejected.'

"For the purposes of this inquiry, the statement of the claimants as to the contract, the expense they incurred in its performance, their readiness to perform the contract, and the failure on the part of the Government, may be assumed to be correct."

Section 5 of the act of September 2, 1789, (1 Stat., 66,) provides that "it shall be the duty of the Auditor to receive all public accounts, and after examination to certify the balance, and transmit the accounts, with the vouchers and certificate, to the Comptroller for his decision thereon." Section 3 of the same act provides that "it shall be the duty of the Comptroller to superintend the adjustment and preservation of the public accounts; to examine all accounts settled by the Auditor, and certify the balances arising thereon to the Register," &c.

According to my construction of said section 5, it means that the Auditor shall state, on the one hand, what has been received, used, or applied to the benefit of the Government, with its express or implied assent; and, on the other hand, what has been received, used, or applied to the benefit of the party presenting the claim, with his express or implied assent. Then he shall compare the statements and certify the balance.

Thompson & Co. do not pretend that their claim is for anything that has been received or used or applied to the benefit of the United States, but is for the depreciation of property in their hands, occasioned by the termination of the war. Assuming that the Government was wrong and violated its contract, I do not think that the Auditor has power to award damages against it upon that ground. These damages are unliquidated, and the amount thereof can only be ascertained by the opinions of witnesses. Vouchers are to accompany

Claim for Damages for Breach of Contract.

the certificate of balance from the Auditor to the Comptroller, which raises an implication that his power is confined to the examination of debits and credits, and does not extend to the liquidation of uncertain damages.

This question has been decided by my predecessors in office.

Mr. Taney, in speaking of a similar case, said: "If the Navy commissioners have refused to take the bread from Mr. Stiles, according to contract, when he had prepared it of the quality called for by the agreement, it is not in the power of the executive branch of the Government to liquidate and pay the damages he may have sustained. If he has been damnified by the officers of the Government, Congress alone can redress the injury."

Mr. Nelson said: "I am quite clear that the accounting-officers of the Treasury have no authority to adjust the claims of said contractor for damages without the special authority of an act of Congress." (4 Opin., 327.)

Mr. Cushing said: "It would be an unheard-of thing for an Auditor, appointed to audit an account, to enter into a question of unliquidated damages for breach of contract." (6 Opin., 524.)

I concur in these opinions.

From what is stated to me, this seems to be a hard case for Messrs. Thompson & Co.; but Congress, if so disposed, can provide a remedy; or the claim, if it was not barred by the statute of limitations, could be prosecuted in the Court of Claims. To allow an Auditor, before whom the proceedings are *ex parte*, and who has no power to subpoena witnesses or to take depositions, to adjudicate claims against the Government for alleged violations of its contracts, would open a dangerous door of access to the Treasury.

I am constrained, therefore, to hold that the executive officers of the Government have no power to audit and pay this claim.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,
Secretary of War.

National Cemetery at Grafton.

NATIONAL CEMETERY AT GRAFTON.

Seem that, inasmuch as the title to the site of the national cemetery at Grafton, in West Virginia, is not yet vested in the United States, nor jurisdiction over the same ceded thereto by the State, the local laws imposing taxes on personal property may be enforced upon such site the same as elsewhere in the State, and, consequently, that no exemption in favor of personal property belonging to the superintendent of the cemetery can be claimed simply because it is found thereon.

DEPARTMENT OF JUSTICE,

April 9, 1872.

SIR: The question referred to me for my opinion in your letter of the 16th ultimo is: Whether the personal effects, &c., of the superintendent of the national cemetery at Grafton, West Virginia, are liable to taxation by State and county.

The land upon which the national cemetery is situated was taken possession of by the Secretary of War, under the act of February 22, 1867, (14 Stat., 399,) and, as directed by that act, was appraised by the district court for that district. The appraisal seemed to the War Department exorbitant, and the district attorney for West Virginia was directed to have the decree confirming the appraisal set aside and a new appraisal made. By reason of various circumstances, the arguing of the motion for a new appraisal has been postponed until the August term, 1872.

The question involved in this case is, whether the United States has jurisdiction over the land in question. After providing that the Secretary of War may procure by purchase the land selected as a site for a national cemetery, or, in event of his not being able to agree with the owners upon a price, that he may enter upon and appropriate such lands and have them appraised by the proper courts, the 6th section of the act of February 22, 1867, (14 Stat., 400,) further provides that "the fee-simple of all real estate thus entered upon and appropriated for the purposes of this act, and of which appraisement shall have been made under the order and direction of any of said courts, shall, upon payment to the owner or owners respectively of the appraised value, or in case said owner or owners refuse or neglect for thirty days after the appraise-

Choctaw Indian Bonds.

ment of the cash-value of the said real estate or improvements by any of the said courts to demand the same from the Secretary of War, upon depositing the said appraised value in the said court making such appraisement, to the credit of said owner or owners respectively, be vested in the United States, and its jurisdiction over said real estate shall be exclusive," &c. By this section the vesting of the fee-simple and of the jurisdiction are made simultaneous.

The title of the site of the Grafton cemetery is not yet vested in the United States, nor has there been any cession of jurisdiction by the State of West Virginia. The jurisdiction over said cemetery, therefore, remains in the State of West Virginia.

I am, therefore, of the opinion that the same laws and taxes may be enforced thereon as in other parts of the same State.

Very respectfully, &c.,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,
Secretary of War.

CHOCTAW INDIAN BONDS.

By the act of March 2, 1861, chap. 85, authority was given to the Secretary of the Treasury to issue to the proper authorities of the Choctaw tribe of Indians, on their requisition, bonds of the United States to the amount of \$250,000 on account of a claim of said tribe against the Government; this authority was, by subsequent legislation, withdrawn from the Secretary before any requisition for the bonds had been made by the tribe; but, by the act of March 3, 1871, chap. 120, Congress authorized the Secretary to issue to the tribe bonds to the amount of \$250,000, as directed by the first-mentioned act. The tribe has since requested the Secretary to issue the bonds, and also to pay interest on the same from March 2, 1861. *Held* that the bonds, being issuable only in virtue of the authority given by the act of 1871, must bear date subsequent to the passage of that act, and that they cannot be made to bear interest from a period anterior to their date; *held*, further, that the Secretary is not authorized to pay interest upon the said amount of \$250,000 prior to the date of the bonds which may be issued under that act.

Choctaw Indian Bonds.

DEPARTMENT OF JUSTICE,

April 17, 1872.

SIR: I have the honor to acknowledge the receipt of your letter of the 3d instant, asking my opinion as to whether or not "the Secretary of the Treasury is authorized to allow interest upon bonds that may be issued to the Choctaw Nation of Indians under the last clause of the first section of an act approved March 3, 1871, entitled 'An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30, 1872, and for other purposes,' (16 Stat., 570,) and the act of March 2, 1861, entitled 'An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30, 1862,'" (12 Stat., 214.)

Reference is made to that portion of the act of 1871 which reads as follows: "And the Secretary of the Treasury is hereby authorized to issue to the Choctaw tribe of Indians, bonds of the United States to the amount of two hundred and fifty thousand dollars, as directed by the act of March 2, 1861, entitled 'An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes,'" and also to that portion of said act of 1861 which reads as follows: "For payment to the Choctaw Nation or tribe of Indians, on account of their claim under the eleventh and twelfth articles of the treaty with said nation or tribe, made the 22d of June, 1855, the sum of five hundred thousand dollars, two hundred and fifty thousand dollars of which sum shall be paid in money, and for the residue the Secretary of the Treasury shall cause to be issued to the proper authorities of the nation or tribe, on their requisition, bonds of the United States authorized by law at the present session of Congress: *Provided*, That in the future adjustment of the claims of the Choctaws, under the treaty aforesaid, the said sum shall be charged against the said Indians."

You state that the council of the Choctaw Nation has passed an act, recently, requesting you to issue the bonds

Choctaw Indian Bonds.

specified in said act, and also to pay to the Choctaw Nation the interest on the same from the 2d of March, 1861.

Bonds are to be issued under the act of 1871, and, of course, must bear date subsequent to the passage of that act, and it is difficult to see how interest can accrue or be paid upon bonds before their existence. I suppose the demand of the Choctaw Nation to be for interest on the \$250,000, to be paid in bonds, from the passage of the act in 1861 until the bonds are issued under the act of 1871, on the ground of the indebtedness of the United States to the Choctaw Nation in that amount during that time.

Whether the Choctaws have an equitable claim for interest on said sum during said time is a question for Congress to decide. To authorize the Secretary of the Treasury to pay such interest, it must appear that the Government has either made some agreement or passed some law providing for its payment. Assuming that the United States agreed to give to the Choctaws bonds for their indebtedness, which would, of course, bear interest, there is no agreement to pay interest upon the sum before the bonds are issued, nor any law directing the Secretary, or appropriating any money, to pay such interest. Interest is in the nature of damages for an unjust refusal to pay a debt that is due. Government, as a general rule, does not pay interest.

Attorney-General Wirt says upon the subject: "Interest is not a thing of course. It is in no case part of the debt, nor is it a necessary consequence of the debt," (1 Opin., 555.)

Attorney-General Black says: "An obligation to pay interest is not to be implied against the Government, as it is against a private party, from the mere fact that the principal was detained from the creditor after his right to receive it had accrued," (9 Opin., 59.)

In the case of *Todd vs. The United States*, (Devereux's Rep., 95,) the Court of Claims says: "This court cannot allow interest upon claims against the United States in the absence of a contract to pay it, even in cases of long delay under vexatious and oppressive circumstances, as this would render necessary the exercise of a vague and unlimited discretion not vested in the court."

According to the act of 1861, these bonds were to be issued

Choctaw Indian Bonds.

upon a requisition therefor by the proper authorities of the nation or tribe; and from the papers accompanying your letter, to which I am referred for information, it appears that no such requisition was made until some time in the year 1870. Whether or not the Secretary of the Treasury had a right to issue the bonds before the act of 1871 is a question about which there are grave doubts, but which it is not necessary to decide.* But it appears that, for a considerable portion of the time from the act of 1861 until the act of 1871, the Secretary had no such power, and that, in the opinion of Congress, the Choctaws were not entitled to either principal or interest, on account of their alliance with the enemies of the Government, (12 Stat., 528; 13 Stat., 563.)

Assuming all that can be claimed, that the United States became indebted to the Choctaws, in 1861, in the sum of \$250,000; and had neglected and refused to make payment until 1870, it does not follow that the Secretary of the Treasury can pay interest upon that sum during that time, for there is no agreement by the Government or law to make such payment. Whatever views the Secretary may entertain of the equities of the parties, he can only pay out money as directed by law.

I am, therefore, of the opinion that the Secretary of the Treasury is not authorized to pay interest upon said sum of \$250,000 prior to the date of the bonds issued or to be issued under the act of 1871.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. GEO. S. BOUTWELL,

Secretary of the Treasury.

* See an opinion of Mr. Attorney-General Akerman, addressed to the Secretary of the Treasury, under date of December 15, 1870, (13 Opin., 354,) wherein this question is considered in connection with the provisions of a treaty with said tribe of April 28, 1866, under which, Mr. Akerman holds, the Secretary might lawfully issue the bonds, as provided in the act of March 2, 1861.

Rock Island Bridge.

ROCK ISLAND BRIDGE.

The Government may permit the Davenport and Saint Paul Railroad Company to use the bridge across the Mississippi River at Rock Island, upon the payment by that company of one-third of the cost thereof; one-half of which to be paid to the United States and the other half to the Chicago, Rock Island and Pacific Railroad Company, (assuming that the latter company has complied with the requirements of the joint resolution of July 20, 1868.)

DEPARTMENT OF JUSTICE,*April 18, 1872.*

SIR: I have the honor to acknowledge the receipt of your letter of the 1st instant, inclosing bill H. R. 1672, granting to the Davenport and Saint Paul Railroad Company the right of way over the bridge across the Mississippi River at Rock Island.

You inquire "whether, in view of the legislation already had by Congress, authorizing the construction of the bridge, and the guarantee given by the Chicago, Rock Island and Pacific Railroad Company to fulfill the conditions imposed by law in regard to the construction of said bridge, sufficient authority is vested in the War Department or in the United States to grant to other railroads than that named the right of way over the Rock Island bridge."

I have to say, in answer, that Mr. Elmore, representing the Chicago, Rock Island and Pacific Railroad Company, and the Hon. Hiram Price, representing the Davenport and Saint Paul Railroad Company, appeared before me, and, in respect to the subject-matter of said inquiry, agreed in effect as follows: That the Government had the right to permit the said Davenport and Saint Paul Railroad Company to cross said bridge upon the payment by the said company of one-third of the cost thereof, one-half of which was to be paid to the said Chicago, Rock Island and Pacific Railroad Company, and the other half to the United States.

Assuming that the said Chicago, Rock Island and Pacific Railroad Company has complied with the requirements of the joint resolution of Congress of July 20, 1868, which seems to be conceded, I think that the said agreement of the parties accords with a correct construction of existing laws. Each

Fort Leavenworth Military Reservation.

company is, of course, to pay one-third of the cost of keeping said bridge in repair.

Doubts seem to exist as to whether the Secretary of War has power to make the proposed arrangement with the Davenport and Saint Paul Railroad Company, as that power is vested by said joint resolution in the "Government," and also as to the payment of the said company's proportion of the cost of said bridge.

I think it proper, therefore, if not absolutely necessary, for Congress to pass an act consenting to the use of said bridge by the said Davenport and Saint Paul Railroad Company, and providing that so much of the money to be paid by said company for the use of said bridge as may become due to the Government shall be paid into the Treasury of the United States.

Very respectfully, &c.

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,
Secretary of War.

FORT LEAVENWORTH MILITARY RESERVATION.

Jurisdiction over the lands lying within the limits of the military reservation of Fort Leavenworth passed from the United States to the State of Kansas under the operation of the act of June 29, 1861, chap. 20, admitting that State into the Union; and to restore such jurisdiction to the United States, a cession thereof by the State is necessary.

DEPARTMENT OF JUSTICE,

April 19, 1872.

SIR: I have the honor to acknowledge the receipt of your letter of the 30th ultimo, inclosing papers touching the military reservation of Fort Leavenworth, Kansas, and submitting for my official opinion the following questions:

"1st. Whether under the Constitution the reservation of this land as a site for a military post and public buildings takes it out of the operation of the law of March 3d, 1859, (11 Stat., 430, 431.)

"2d. What action will be required on the part of the Executive or Congress to restore the land comprising this reservation to the exclusive jurisdiction of the United States?"

Fort Leavenworth Military Reservation.

Respecting that part of the reservation which is included within the *pink* lines traced on the plat thereof, as surveyed by Captain F. E. Hunt, a copy of which plat accompanied your communication, I have to say that the Supreme Court of the United States, in the case of *United States vs. Stone*, (2 Wall., 525,) has substantially decided that the land thus described never was a portion of the territory allotted to the Delaware tribe of Indians; that it was legally reserved by the President for military purposes; and that the Secretary of the Interior, in 1861, transcended his authority when he ordered surveys to be made of this land. Practically, then, the decision of that case disposes of so much of the subject of your communication as relates to the legally-established limits of the reservation; there being, as I understand, no doubt concerning that part of the reservation which is described on the plat by *yellow* lines.

But, while the United States appear to now hold the lands embraced by the said plat as a military reservation, they never having parted with the title thereto, it would seem that the jurisdiction over the same has passed to the State of Kansas by virtue of the act of June 29, 1861, admitting that State into the Union. The effect of that act was to withdraw from Federal jurisdiction all the territory within the boundaries of the new State, *excepting only* the territories of Indians having treaties with the United States which provided that, without their consent, such territory should not be subjected to State jurisdiction, (see *United States vs. Ward*, 1 Wool., C. C. Rep., 17; *United States vs. Stahl*, *ibid.*, 192.) The reservation is within the territorial limits of the State, and does not come within the exception adverted to.

To restore the Federal jurisdiction over the land included in the reservation, it will be necessary to obtain from the State of Kansas a cession of jurisdiction, which, I have no doubt, will be readily granted by the State legislature upon application.

The papers are herewith returned.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,
Secretary of War.

Costs.

COSTS.

Seemle that by the laws of Texas the defendant in a civil action, which has resulted in his favor, is liable to the officers of the court for so much of the costs of the suit as was incurred in his behalf, but no more.

Where, however, the taxation of costs is erroneous or improper, the remedy of the party aggrieved is by motion to the court to retax.

DEPARTMENT OF JUSTICE,

April 22, 1872.

SIR: I have the honor to acknowledge the receipt of your letter of the 11th instant, referring to the case of Willis Walker *vs.* Captain Charles Bentzoni, Twenty-fifth United States Infantry, in the district court of El Paso County, Texas.

Captain Bentzoni has, as you say, under a law of the State of Texas, been compelled to pay the costs in the case of said Walker against him, although he, as defendant, received a verdict in his favor, the plaintiff making oath of his inability to pay. You inquire if any such liability, on the part of Captain Bentzoni, exists under the laws of that State.

According to the laws of Texas concerning costs in the district courts of that State, it would seem that each party to a suit is responsible to the officers of court for *the costs incurred by himself*; but, at the same time, the party in whose favor the judgment is given is entitled to an execution for all his costs against the adverse party, under such limitations as are prescribed by law.

I do not understand that the successful party is liable to the officers of the court for the costs incurred by the unsuccessful party in the event of the latter being unable to pay them. In the case of *Cleveland vs. Henderson*, (4 Texas Rep., 182,) it was held that where a plaintiff had recovered judgment for costs, but was unable to make them out of the defendants, he was responsible to the officers of the court for *so much only* of the costs of the suit *as was incurred in his behalf*. The same rule would, I think, be applied under the Texas laws to the case where judgment is rendered for a defendant. So that, in the case referred to, the defendant may be regarded as liable to the officers of the court for so much of the costs charged in the fee-bill as was incurred by himself,

Claim of Captain R. H. Wyman.

but no more. Certain items so charged are apparently costs incurred in behalf of the plaintiff, and for which the defendant is not legally liable. But where the taxation of costs is erroneous or improper, the remedy of the party aggrieved is by motion to the court to retax.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,
Secretary of War.

CLAIM OF CAPTAIN R. H. WYMAN.

The papers in this case presenting, in important particulars, inconsistent and contradictory statements, are returned without an opinion, to the end that the facts upon which the claim is based may be more definitely ascertained before passing upon its merits.

DEPARTMENT OF JUSTICE,

May 1, 1872.

SIR: In your communication of the 8th ultimo to the Attorney-General, asking an opinion upon the claim of Captain R. H. Wynan for a share of the prize-money decreed to the captors of the steamer Gertrude, captured by the United States steamship Vanderbilt, in April, 1863, you say, "The material facts in this case are stated in the various papers herewith transmitted."

The papers referred to comprise, among other things, a report upon said claim made to you by the Naval Solicitor, under date of April 1, 1872; and also a copy of a letter addressed to Attorney-General Speed, dated August 10, 1864, by the then Secretary of the Navy, Mr. Welles, touching the same matter. On examination of these, I find that there exists, to some extent, an inconsistency between the statements of fact presented in these two papers, and they are contradictory of each other in particulars which seem to be important.

In this condition of things, if it devolved upon this Department to determine what are the actual and established facts of the case submitted by you, I could not discharge that duty without much difficulty, if at all. But it is not within my province to determine the facts of the case. This must be

Eight-Hour Law.

done by your Department; and until it is so done, I do not feel authorized to enter upon an examination of the questions of law arising on one or the other state of facts.

Should you be pleased to furnish me with a statement of the ascertained facts upon which the claim of Captain Wyman is predicated, I will with pleasure give you an opinion upon any question of law arising out of the facts on which you may desire my opinion.

The papers mentioned are herewith respectfully returned.

Very respectfully, your obedient servant,

B. H. BRISTOW,

Solicitor-General and Acting Attorney-General.

Hon. GEO. M. ROBESON,

Secretary of the Navy.

EIGHT-HOUR LAW.

The provisions of the act of June 25, 1868, chap. 72, declaring that eight hours shall constitute a day's work for all laborers, workmen, and mechanics employed by or on behalf of the United States, are not applicable to mechanics, workmen, and laborers who are in the employment of a contractor with the United States. That act was not intended to extend to any others than the immediate employés of the Government.

DEPARTMENT OF JUSTICE,

May 2, 1872.

SIR: I have considered the question submitted in your letter of the 25th ultimo, viz: Whether or not the act of Congress of June 25, 1868, (15 Stat., 77,) which declares that eight hours shall constitute a day's work for all laborers, workmen, and mechanics employed by or on behalf of the Government of the United States, is applicable to the case of two hundred stone-cutters now employed near Richmond, Virginia, in getting out granite for the building in course of erection for the Department of State.

Accompanying your letter, in originals, are the contract and supplemental contract between the United States and Albert Ordway, under which, as is stated by you, these stone-cutters are employed. On examination of the contract and supplement, I find that Mr. Ordway, the employer of the men in question, stands in the relation of a contractor with the

Eight-Hour Law.

Government of the United States, and not its servant or appointee. By his contract he has undertaken to furnish to the Government stone of a certain character and description in quantities regulated by the terms of the contract. He assumes the whole burden of quarrying the stone, preparing it for use, and delivering it at the place of building. The men who are employed by him to do this work can no more be said to be employed by or on behalf of the Government than the laborers or mechanics employed in the workshop of any manufacturer engaged in making machinery for the Government under a contract.

The letter of the act of Congress limits its operation to laborers, workmen, and mechanics employed by or on behalf of the Government of the United States, and I am aware of no reason to suppose that the act was intended to have operation beyond the immediate employés of the Government.

Mr. Ordway himself employs the men, and he alone is responsible to them for their wages. He would certainly have just cause of complaint if the Government should undertake to interfere between him and his employés by prescribing regulations for their labor. Their work is being done at his instance, under his employment, and for his benefit. He is at liberty to discharge such as do not comply with the terms of their employment, and employ others in their stead. I am aware of no rule of law which would make the Government in any event answerable to them for his default, or hold it responsible for any failure of engagement on their part. The case of *Hilliard vs. Richardson* (3 Gray, 349) is a careful review of the law on the subject, and fully sustains what I have said.

I am, therefore, of opinion that the act of Congress above cited has no application whatever to the men employed by Mr. Ordway in this business.

The papers accompanying your communication are herewith returned, as requested.

Very respectfully, your obedient servant,

B. H. BRISTOW,

Solicitor-General and Acting Attorney-General.

Hon. HAMILTON FISH,

Secretary of State.

Private Land-Claims in California.

PRIVATE LAND-CLAIMS IN CALIFORNIA.

Section 13 of the act of March 3, 1851, chap. 41, to ascertain and settle private land-claims in California, directs the issue of a patent by the General Land-Office, only where the claim has been finally confirmed as therein stated, and thus in effect withholds authority to issue one where the claim has never been before the commission constituted by that act.

Accordingly, where it appeared that an applicant for a patent for the island of Yerba Buena, claiming title thereto under a Mexican grant, had never presented his claim to said commission: *Held* that this circumstance alone furnished sufficient ground on which to deny his application.

DEPARTMENT OF JUSTICE,

May 2, 1872.

SIR: I have had under consideration your communication to this Department of the 24th ultimo, and the inclosure received therewith, relative to the application of Thomas H. Dowling for a patent for the island of Yerba Buena.

Dowling, as I understand from the paper submitted, claims the said island by virtue of a right or title derived from the Mexican government, but has never presented his claim to the commission constituted by the act of March 3, 1851, (9 Stat., 631,) for the purpose of ascertaining and settling private land-claims in the State of California, and the question you propose is whether the non-presentation of his claim to the board of commissioners furnishes a legal ground for rejecting his application.

The statute above cited provides, in section 13, that "for all claims finally confirmed by the said commissioners, or by the said district or supreme court, a patent shall issue to the claimant upon his presenting to the General Land-Office an authentic certificate of such confirmation," &c. This provision authorizes the issue of a patent only where the claim has been finally confirmed as therein stated, and thus in effect withholds authority to issue one where, as in the present case, the claim has never been before the commission. I am not aware of any subsequent act changing the law in this respect.

The conclusion at which I arrive is that there exists no power in your Department to issue a patent for the claim

California and Nevada Volunteers.

referred to. This will sufficiently indicate my answer to your question.

The paper mentioned is herewith returned.

I am, sir, very respectfully, your obedient servant,

B. H. BRISTOW,

Solicitor-General and Acting Attorney-General.

Hon. B. R. COWEN,

Acting Secretary of the Interior.

CALIFORNIA AND NEVADA VOLUNTEERS.

By section 7 of the act of March 2, 1867, chap. 170, provision is made for additional traveling-allowances in favor of "such California and Nevada volunteers as were discharged in New Mexico, Arizona, or Utah, and at points distant from the place or places of enlistment;" and all who fall within that description are authorized to be paid, under the regulations of the Secretary of War, according to the distance traveled by each in returning from the place of discharge to the place of enlistment.

DEPARTMENT OF JUSTICE,

May 8, 1872.

SIR: I have considered the report of Assistant Judge-Advocate-General Dunn, of the 27th of March last, which accompanied your communication of the same date, respecting the claims of California and Nevada volunteers for additional traveling-allowances, under the 7th section of the act of March 2, 1867, (14 Stat., 485,) and concur in the views of the Assistant Judge-Advocate-General respecting the construction of that section.

By the terms of the section it includes "such California and Nevada volunteers as were discharged in New Mexico, Arizona, or Utah, and at points distant from the place or places of enlistment," and this irrespective of whether they were discharged by reason of the end of the war, or by reason of the services of the organization being no longer required, or by reason of disability from sickness, wounds, &c., before the end of the war, or by reason of the expiration of their term of service, either before or after the end of the war. All who fall within that description are authorized to be paid, under the regulations of the Secretary of War, according to the dis-

Claim of Caleb H. Blood.

tance traveled by each in returning from the place of discharge to the place of enlistment.

The report mentioned and other papers submitted by you are herewith returned.

Very respectfully, your obedient servant,

B. H. BRISTOW,

Solicitor-General and Acting Attorney-General.

Hon. WM. W. BELKNAP,

Secretary of War.

CLAIM OF CALEB H. BLOOD.

The appropriations made by the acts of June 15, 1864, chap. 124, and March 3, 1865, chap. 81, "for supplies, transportation, and care of prisoners of war," are in terms applicable to none but prisoners of war.

By the words "prisoners of war," as used in those acts, are meant persons of the enemy who are captured and detained by our forces; and therefore Union soldiers who were captured by the rebels and afterward escaped or were paroled are not within the scope of the appropriations mentioned.

Accordingly, where persons of the latter description were supplied with necessaries of life and otherwise aided by a private party, who presents a claim against the Government for re-imbursement of his outlays and compensation for his services: *Held* that the claim, however meritorious it may be, cannot be paid out of either of those appropriations.

DEPARTMENT OF JUSTICE,

May 14, 1872.

SIR: Your communication of the 26th ultimo, and the papers inclosed therewith, present the following facts:

Prior to August, 1862, Mr. Caleb H. Blood was the United States consul at Monterey, Mexico. On resigning, in that month, he established trading-houses at Bagdad and Matamoras, Mexico, which he kept up until the close of the war; and during the interval between the fall of 1862 and the spring of 1865 he was frequently engaged in supplying with the necessaries of life, and otherwise aiding, refugees and paroled prisoners of war who escaped from Texas and flocked to Matamoras in large numbers in destitute condition. It appears that some of the men thus supplied and assisted were Union citizens of Texas, who had fled from rebel oppres-

Claim of Caleb E. Blood.

sion, and that they subsequently enlisted in the First and Second Texas Regiments of United States Volunteers. Others were Union soldiers who had been captured by the rebel forces, and, as I learn from the report of General Smith accompanying your communication, some of them were paroled by the rebel authorities, and others had escaped from rebel prisons. The assistance thus rendered to these men by Mr. Blood was done at the instance and request, as was stated, of Mr. Leonard Pierce, jr., United States consul at Matamoras; Major-General Herron, commanding the United States forces on the Rio Grande in 1863 and 1864; and Major-General Banks, commanding the Department of the Gulf.

There seems to be no doubt whatever that the services were rendered as claimed by Mr. Blood, and that what he did in the premises was done from patriotic motives and in good faith, under the belief that he would be re-imbursed by the Government of the United States. His claim for services and for money expended seems to have been presented to General Herron in November, 1864, but for some reason was not presented at Washington for payment. It also appears from the report of General Smith that Mr. Pierce, from whom Mr. Blood claims to have derived his authority to make these expenditures, has himself received a large amount from the Government for expenses incurred at the same time and place in providing for the wants of paroled prisoners and Union refugees. A part of Mr. Pierce's claim seems to have been paid by the War Department in 1867, but out of what appropriation I am not advised, and the balance, \$11,843.89, in gold, was paid in 1869, under the authority of a joint resolution of Congress approved February 19, 1869, (15 Stat., 463.)

Upon these facts you desire to be advised whether or not, in my opinion, the claim of Mr. Blood can be paid by your Department out of the appropriation "for supplies, transportation, and care of prisoners of war," approved June 15, 1864, (13 Stat., 127,) or out of the appropriation "for supplies, transportation, and care of prisoners of war," approved March 3, 1865, (*ibid.*, 496.)

By the terms of these acts of Congress, the appropriations in question are applicable exclusively to prisoners of war; and in order to justify the use of these appropriations in the

Compromise of Internal-Revenue Cases.

payment of Mr. Blood's claim, it must be assumed that Union soldiers captured by the rebels and paroled or escaping from their prisons are "prisoners of war" within the meaning of the appropriation acts aforesaid. Such a construction of the acts I do not think allowable. It will be observed that both of them were passed while the Government of the United States was engaged in civil war. The term "prisoners of war" means those of the enemy captured by our forces, (Duane's Military Dictionary,) and I am of opinion that this is the sense in which the term is used in the appropriation acts to which you refer.

I am, therefore, of opinion that the claim of Mr. Blood, however meritorious, cannot be paid out of either of the appropriations to which I have been referred.

Whether or not there is any other appropriation available for the payment of this claim is a question not submitted to nor considered by me.

Very respectfully, your obedient servant,

B. H. BRISTOW,

Solicitor-General and Acting Attorney-General.

Hon. WM. W. BELKNAP,

Secretary of War.

COMPROMISE OF INTERNAL-REVENUE CASES.

Where an assessor of internal revenue was indicted upon the provisions of section 30 of the act of March 2, 1867, chap. 169, and of sections 97 and 98 of the act of July 20, 1868, chap. 186, for having entered into a corrupt arrangement with certain distillers to defraud the Government, and before trial proposed terms of compromise to the Commissioner of Internal Revenue, under section 102 of the last-mentioned act: *Held* that the case does not come within the purview of the latter section.

DEPARTMENT OF JUSTICE,

May 15, 1872.

SIR: Your letter of the 10th ultimo and the accompanying copy of one from the Acting Commissioner of Internal Revenue present the following facts:

Horace Boughton, late assessor of internal revenue in the

Compromise of Internal-Revenue Cases.

fourth collection district of Texas, stands indicted for having entered into a corrupt arrangement with certain distillers within his district to defraud the United States. The indictment charges the offense to have been committed while he was in the office of assessor, and is founded upon the provisions of section 30 of the act of March 2, 1867, (14 Stat., 484,) and sections 97 and 98 of the act of July 20, 1863, (15 Stat., 164, 165.) No trial has been had upon this indictment, but Mr. Boughton has proposed terms of compromise to the Commissioner of Internal Revenue, under section 102 of said act of 1868, and the Attorney-General is asked whether or not, in his opinion, the power to compromise given by that section includes this case.

On the 7th of February last the Attorney-General, in answer to a communication from you, expressed the opinion (see *ante* p. 8) that the case of an internal-revenue officer indicted for embezzlement under the 16th section of the act of August 6, 1846, (9 Stat., 63,) and the 61st section of the act of June 30, 1864, (13 Stat., 241,) was not within the class of cases which might be compromised under the 102d section of the act of 1868 aforesaid, and in that opinion he said, among other things, "This clearly implies a compromise with the tax-payer, and not with the collector of taxes."

I see no substantial difference between that case and the one now under consideration, and, following the opinion of the Attorney-General heretofore expressed, I have the honor now to reply to you that, in my opinion, the case of Mr. Boughton is not within the purview of the 102d section of the act of July 20, 1868.

I return herewith the original papers accompanying your communication.

Very respectfully, &c.,

B. H. BRISTOW,

Solicitor-General and Acting Attorney-General.

Hon. GEO. S. BOUTWELL,

Secretary of the Treasury.

Eight-Hour Law.

EIGHT-HOUR LAW.

The interpretation of the act of June 25, 1868, chap. 72, commonly called the eight-hour law, given in a former opinion, (see *ante* p. 37,) re-affirmed. Where different statements of facts appear in any case that has been submitted by the head of a Department to the Attorney-General, the latter will not undertake to reconcile the differences between them, but in giving an opinion upon the questions presented will consider only such facts as are set forth or admitted by the head of the Department.

DEPARTMENT OF JUSTICE,
May 18, 1872.

SIR: I have the honor to acknowledge the receipt of your letter of the 16th instant, inclosing a copy of one of the 10th from the Hon. N. P. Banks, and asking whether in my opinion the statement of facts made by General Banks changes the legal aspect of the case of the laborers employed at or near Richmond, Virginia, in getting out stone for the building for the use of the State Department, now in process of erection.

In my letter of the 2d instant, (*ante*, p. 37,) replying to the question presented in yours of the 25th ultimo, I expressed the opinion that the men in question were the employés of Mr. Ordway; that they were not employed by or on behalf of the Government of the United States, and therefore were not entitled to the benefit of the act of Congress, approved June 25, 1868, known as the eight-hour law. When that opinion was requested, the only facts furnished me were contained in the original and supplemental contract, in writing, between the United States and Mr. Ordway, and the bond, with surety, attached thereto.

From these papers it appears that on the 16th day of November, 1871, a contract was entered into between Mr. Alfred B. Mullett, supervising architect of the new State Department building in course of erection in Washington, for and in behalf of the United States of America, of the first part, and Albert Ordway, of the city of Richmond and State of Virginia, of the second part, in pursuance of a bid made by the latter on the 19th day of June, 1871, and accepted by the United States, whereby Mr. Ordway undertook

Eight-Hour Law.

and agreed to furnish from certain quarries in Virginia, and to deliver on the site of the said building in Washington, granite of a certain description and quality, to be used in the construction of the building, for which Mr. Mullett, as the representative of the United States, undertook that Mr. Ordway should be paid at a certain rate per cubic foot; ninety per cent. of the contract-price to be paid on the delivery of the stone at the site of the building, and ten per cent. to be retained until the completion of the entire contract to the approval and acceptance of the party of the first part, with the further stipulation that the last-named amount should be forfeited by the party of the second part in the event of the non-fulfillment of his contract to the entire satisfaction of the party of the first part. It was further stipulated that the United States would reimburse Mr. Ordway for all payments made by him on account of labor, tools, materials, and also for insurance on the granite. For the purpose of securing the faithful and complete fulfillment of the undertaking of Mr. Ordway, the contract further contained a covenant of lease to the United States of the quarries in the State of Virginia, with all and singular the tools, buildings, wharves, and appurtenances thereunto belonging, with the full right, authority, and power to enter upon, occupy, and use the same, or procure therefrom any or all such stones as the said Ordway should fail or decline to furnish under said contract.

It was expressly provided that this lease was executed for the purpose of securing to the United States a sufficient and suitable supply of granite for said building from said quarries, and that the lease was not to take effect unless the party of the second part should be in default in the execution of his contract, and unless the United States should give to him eight days' notice, in writing, of intention to enter upon and occupy the said quarries for the purpose aforesaid. As additional security for the performance of said contract, Mr. Ordway also entered into a bond with the United States, in the penal sum of \$50,000, with George W. Cook and Chauncey M. Lockwood as sureties, conditioned for the faithful performance of the contract hereinbefore recited.

Upon these facts I entertained no doubt whatever that the

Eight-Hour Law.

men employed in getting out the granite were the employés of Mr. Ordway, and not employed by, or on behalf of, the Government of United States, and therefore not entitled to the benefit of the act of Congress aforesaid.

The letter of General Banks, accompanying your last communication, contained a statement of facts wholly different from this. For instance, General Banks says, "a part of these men were employed by Colonel W. Randall, who was appointed by the United States Government as general superintendent of the work being done near Manchester, Virginia, for the new State Department. Other workmen were engaged by Messrs. William H. Johnson and R. H. Miller, both of whom derived their authority to employ laborers from the Government. He further says the pay-rolls for these men are made out by Colonel Randall, signed by the workmen, and sent by Colonel Randall to the State Department, where they are approved; and they are then returned to Mr. Ordway, who pays the laborers the amounts due them."

While I do not question the correctness of the statements of General Banks, I have only to say that no such facts appear in the papers submitted to me with your communication of the 25th ultimo. In your letter of the 16th instant, referring to the letter of General Banks, you are pleased to say: "This Department has no knowledge of the fact stated by General Banks, that William H. Johnson and R. A. Miller employed under authority from the Government some of the men now engaged on the work in question. The names of Johnson and Miller appear on the pay-rolls of the work as foremen, but they stand, as far as the pay-rolls show, in the same relation to Mr. Ordway and the United States Government as do all the other workmen."

If my opinion were now asked upon the statement of facts made by General Banks, it would probably be different from the opinion heretofore expressed to you, but, in view of the statement in your last communication, I do not feel at liberty to accept the statements of General Banks's letter as varying the facts set forth in the original and supplemental contract and the bond executed by Mr. Ordway to the United States. The facts of the case seem to be differently understood by General Banks and yourself. This difference I cannot under-

Commissioners of Centennial Exhibition.

take to reconcile, but in giving an opinion for the use of your Department I must be confined to the facts communicated by you. It is not the province of this Department to settle disputed facts, and I cannot undertake to do so in this case.

Upon the facts contained in your communications and the original and supplemental contracts and bond, I see no reason to change the opinion expressed to you in my letter of the 2d instant.

I have the honor to be, sir, your obedient servant,

B. H. BRISTOW,

Solicitor-General and Acting Attorney-General.

HON. HAMILTON FISH,

Secretary of State.

COMMISSIONERS OF CENTENNIAL EXHIBITION.

The President has power to fill vacancies happening subsequent to March 3, 1872, in the centennial commission created by the act of March 3, 1871, chap. 105, on the nomination of the governors of the States and Territories respectively.

DEPARTMENT OF JUSTICE,

May 22, 1872.

SIR: Your letter of the 13th instant presents this question: Has the President power to fill vacancies, on the nomination of the governors of the States and Territories respectively, which may happen subsequent to the 3d of March, 1872, in the commission appointed in pursuance of the act of Congress providing for an international exhibition of arts, &c., in the city of Philadelphia, approved March 3, 1871?

I am of opinion that this question must be answered in the affirmative. Although the act does not in terms authorize the President to fill vacancies, it nevertheless provides that the functions of the commission shall continue until the close of the exhibition, and requires that it shall be composed of one delegate from each State and from each Territory of the United States.

The 3d section of act, which requires that the commission shall be appointed within one year from its passage, is not to be taken as a limitation upon the power of the Presi-

Steamer Virginus.

dent, but a direction merely for the purpose of having the commission organized within that time. The power to appoint the commissioners, in the first instance, for the purpose declared in the act itself, seems necessarily to imply power to fill vacancies that may happen before the accomplishment of the purpose for which they were appointed, and thus to keep the commission in existence until the close of the exhibition. A different construction might defeat the operation of the act and render its provisions nugatory.

Very respectfully, your obedient servant,

B. H. BRISTOW,

Solicitor-General and Acting Attorney-General.

Hon. HAMILTON FISH,

Secretary of State.

STEAMER VIRGINIUS.

After examination of the papers submitted in this case, and upon consideration of the information furnished thereby: *Advised* that the facts presented do not establish any breach of the neutrality laws, either by the owner of the steamer or by the persons engaged thereon.

DEPARTMENT OF JUSTICE,

June 5, 1872.

SIR: I have considered the statement of F. E. Sheppard, formerly master of the steamer Virginus, and the accompanying affidavits, transmitted to this Department under cover of your letter of the 16th ultimo, in which you request an opinion "as to whether there has been any violation by the above-named vessel, or by the persons engaged in her expedition, of the neutrality or navigation laws of the United States."

The papers submitted furnish information which may give rise to a suspicion that the registry of the steamer was fraudulent, and in violation of the navigation-laws, but they do not seem to contain anything that, from a legal point of view, amounts to evidence of such violation; and in the absence of some proof of the fact, it cannot well be claimed that the law has been violated. I perceive nothing in the statement or affidavits which appears to establish any breach of the

Cape Mendocino Light-House Site.

neutrality-laws, either by the owner of the steamer or by the persons engaged in her expedition.

Upon the whole I am of the opinion that the facts presented would be insufficient to make out a case before a judicial tribunal, on an information charging a violation of our neutrality or navigation laws.

The papers mentioned are returned herewith.

I have the honor to be, your obedient servant,

B. H. BRISTOW,

Solicitor-General and Acting Attorney-General.

Hon. HAMILTON FISH,

Secretary of State.

CAPE MENDOCINO LIGHT-HOUSE SITE.

Selections of the public lands, made by the State of California under the 12th section of the act of March 3, 1853, chap. 145, required the approval of the Secretary of the Interior before title passed from the United States to the State by the grant therein contained.

Under the act of July 23, 1866, chap. 219, selections theretofore made by the State, and disposed of in good faith under the laws of the State, are not confirmed, nor does the title pass until the lands are certified over to the State by the Commissioner of the General Land-Office.

Hence, where the President in 1866 and 1867 reserved for light-house purposes a piece of land in California which had previously been selected by the authorities of that State under the 12th section of the act of March 3, 1853, and by them granted to a private party in accordance with the laws of the State, but the selection has never received the approval of the Secretary of the Interior, nor has the land ever been certified over to the State by the Commissioner of the General Land-Office: *Held* that the legal title to the premises is still in the United States.

DEPARTMENT OF JUSTICE,

June 7, 1872.

SIR: I have examined the report of the Light-House Board and the accompanying papers relative to the light-house site at Cape Mendocino, California, which were received from your Department, with a letter from the Hon. William A. Richardson, Acting Secretary, dated the 29th of April last, requesting an opinion as to the title of the United States to the site mentioned.

It appears that the land within the limits of the site, which

Cape Mendocino Light-House Site.

formerly constituted a part of the public domain, includes lots 1 and 2 of fractional section 28, together with the south half of the northwest quarter and the northwest quarter of the southwest quarter of section 27; both sections being in township 1 north, of range 3 west, Humboldt meridian, and that an approved plat of the township was filed in the land-office at Humboldt in June, 1859.

Part of this land, namely, lot 1 of fractional section 28, was reserved by the President for light-house purposes June 8, 1866, and the remainder was reserved for the same purposes May 23, 1867, since which period the Government has expended on the premises over \$100,000 in the erection of buildings, &c.

But prior to the reservations just referred to, on the 16th of June, 1860, the whole of the land described was selected by the authorities of the State of California, under the 12th section of the act of March 3, 1853, (10 Stat., 248) and was granted by the State to William Brodenson, by patent dated January 19, 1861. The selection made by the State, however, has never received the approval of the Secretary of the Interior, nor has it ever been certified over to the State by the Commissioner of the General Land-Office.

As the only adverse title set up or outstanding against the United States is that derived from the State of California under the aforesaid patent, it is unnecessary here to do more than inquire whether the State held at the date of the patent, or afterward became invested with, the legal title to the land.

Whatever title the State had in the premises was acquired by virtue of the 12th section of the act of March 3, 1853, already cited, and the act of July 23, 1866, (14 Stat., 218.) Under the former enactment, the selections made by the State authorities required the approval of the Secretary of the Interior before title passed from the United States to the State by the grant contained therein; and it is clear that, as the selection of the land has not been approved by the Secretary, the title still remains in the United States, unless it has passed to the State by the operation of the act of 1866. Now, under the latter statute, the selection, notwithstanding the language of the 1st section, is not confirmed, nor does

Limitations as to Trials by Courts-Martial.

the title pass, until the land is certified over to the State by the Commissioner of the General Land-Office, in pursuance of other provisions of the same statute, (see *Hodop vs. Sharp*, 40 Cal., 69; *Toland vs. Mandell*, 38 Cal., 41 and 42;) so that, with respect to the case under consideration, the land selected not having been certified over by the Commissioner, as already stated, the title cannot be deemed to have passed to the State, but must be regarded as still in the United States. Lot 1, of section 28, it may also be observed, was reserved before the passage of the act of 1866, and falls within the exception contained in the first proviso to the 1st section thereof.

In brief, then, as the matter now stands, I think the United States are at present in exclusive possession of the legal title to the site.

The papers are herewith returned.

I have the honor to be, sir, your obedient servant,

B. H. BRISTOW,

Solicitor-General and Acting Attorney-General.

Hon. GEO. S. BOUTWELL,

Secretary of the Treasury.

LIMITATIONS AS TO TRIALS BY COURT-MARTIAL.

The two-years' limitation prescribed by the 88th article of war applies to all offenses triable and punishable by court-martial, including those which may be thus tried and punished under the act of March 2, 1863, chap. 67.

The concealment of an offense by the accused is not a "manifest impediment" to his prosecution, within the meaning of that article, and does not prevent the limitation from running in his favor.

DEPARTMENT OF JUSTICE,

June 12, 1872.

SIR: I have duly considered your letter of the 13th ultimo, in which you ask for a construction of the 88th article of war, limiting the time within which persons shall be tried and punished by court-martial.

That article provides that "no person shall be liable to be tried and punished by a general court-martial for any offense

Limitations as to Trials by Courts-Martial.

which shall appear to have been committed more than two years before the issuing of the order for such trial, unless the person, by reason of having absented himself, or some other manifest impediment, shall not have been amenable to justice within that period."

You desire to know whether, if an officer, guilty of fraud, so conceals it that it could not be detected within the two years mentioned in the article, that would constitute a manifest impediment within the meaning of the exception therein.

There are many cases in which statutes limiting civil actions are suspended by the fraudulent concealment of a cause of action from the aggrieved party; but I do not understand that this doctrine has any application to criminal cases. No exception is made in them in favor of the Government because the offending party has concealed the offense. Concealment, as far as it is possible, follows the commission of every crime, and were that exception to be made in statutes limiting the time within which prosecutions must be brought, the exceptions would greatly exceed in number the cases falling under the rule. No such principle exists in general criminal law, and I do not think that the language of the 88th article of war justifies such a construction being placed upon it. The words "other manifest impediment" must be construed in connection with the words immediately preceding, namely, "by reason of having absented himself," and, taken together, it is apparent that the impediment intended by the article is an impediment similar in kind to absence, and that it is one which renders it impossible for a prosecution to take place. I do not think it could be extended so far as to include concealment of the offense.

The second question is whether the 88th article of war applies to offenses under the act of March 2, 1863, (12 Stat., 696,) and I am of opinion that it does. The language of the article is very broad, and applies to all cases of trial by a general court-martial.

I remain your very obedient servant,

CLEMENT HUGH HILL,

Acting Attorney-General.

Hon. WM. W. BELKNAP,

Secretary of War.

Claim of William P. Adair.

SUITS AND PROSECUTIONS FOR FRAUDS.

Section 3 of the act of March 2, 1863, chap. 67, to prevent and punish frauds upon the Government, contemplates two proceedings, one civil and the other criminal; of which the former is subject to the limitation prescribed by the 7th section of that act, and the latter to that prescribed by the 32d section of the act of April 30, 1790, chap. 9.

DEPARTMENT OF JUSTICE,

June 7, 1872.

SIR: The object of your communication of the 22d of April last, touching the "Booker" case, as I understand it, is to obtain the expression of an opinion from this Department as to the law of limitation applicable to suits and prosecutions against persons not in the military or naval forces under the act of March 2, 1863, (12 Stat., 696.)

The 3d section of that statute provided for a suit for forfeiture and damages against any such person who shall commit any of the acts prohibited, and declares that, in addition thereto, he shall, on conviction in any court of competent jurisdiction, be punished by fine or imprisonment. Here are two proceedings contemplated, the one civil and the other criminal. The former (the suit for the recovery of the forfeiture and damages) falls under the limitation prescribed by the 7th section of the same statute; but the latter (the prosecution for enforcing the punishment by fine or imprisonment) is, I think, governed by the limitation imposed by the 32d section of the act of April 30, 1790, (1 Stat., 119.)

I have the honor to be, sir, your obedient servant,

B. H. BRISTOW,

Solicitor-General and Acting Attorney-General.

HON. WM. W. BELKNAP,

Secretary of War.

CLAIM OF WILLIAM P. ADAIR.

The Attorney-General is not authorized to give an official opinion upon a question involving the estimation of the weight and credibility of testimony offered in support of a claim; this being mere matter of fact, which appropriately belongs to the officers charged with the adjustment and settlement of the claim to determine.

Claim of William P. Adair.

A claim for money expended in defraying the expenses of a delegation of Cherokees visiting the Capital by authority of the Government, in the year 1870, may be allowed out of the appropriation made by the resolution of July 13, 1870, [No. 110.]

DEPARTMENT OF JUSTICE,

June 18, 1872.

SIR: Your communication of the 7th instant, covering a copy of the report of the Commissioner of Indian Affairs, and other papers, in relation to the claim of William P. Adair, for re-imbursement of \$1,734.50, alleged to have been advanced by him to a delegation of North Carolina Cherokees during their visit in Washington, propounds the following questions:

"First. Are the proofs contained in the papers sufficient to warrant the Department in an approval of the claim ?

"Second. If so, can the amount legally be paid out of the funds appropriated under joint resolution of Congress approved July 13, 1870, entitled 'A resolution to pay expenses of Indians visiting the city of Washington ?'"

The first of the foregoing questions seems to involve the consideration, not properly of any matter of law connected with the case referred to, on which alone would it be within my province to give advice, but rather of mere matter of fact, namely, the weight and credibility of the evidence offered in support of the claim, to estimate which it appropriately belongs to the officers charged with the adjustment and settlement of such claims. This being the character of the question, I do not feel authorized to give an official opinion thereon, and I express none.

With regard to the other question, if the claim is for money expended in defraying the expenses of a delegation of Cherokees visiting Washington, in the year 1870, by authority of the United States, and is correct, (none of which facts do I undertake to determine,) it may, in my judgment, be paid out of the appropriation made by the resolution mentioned, (16 Stat., 387;) providing, of course, there are funds of that appropriation still available. In arriving at this conclusion I have not overlooked the provision of the act of March 3, 1871, authorizing the Secretary of the Interior "to defray the expenses of delegations of Indians visiting the city of Washington, &c., subsequent to the first day of January,

Mail-Transportation.

1871, &c., out of the amount remaining unexpended on the 31st day of December, 1870," of the said appropriation. (See 16 Stat., 588.)

The papers received with your communication are herewith returned.

I have the honor to be, &c.,

B. H. BRISTOW,

Solicitor-General and Acting Attorney-General.

Hon. C. DELANO,

Secretary of the Interior.

MAIL TRANSPORTATION.

The 18th section of the act of March 3, 1845, chap. 43, makes it the duty of the Postmaster-General, in every case, to let contracts for mail-service to the lowest bidder offering a sufficient guarantee for the performance of the same. But the statute is to receive a reasonable construction; and inasmuch as payment of a less amount than one cent cannot, practically, be made by the Government, that constitutes the lowest amount at which a bid can be entertained by the Postmaster-General. Accordingly, as between two bidders for carrying the mail over a particular route for a certain period, one of whom offered to perform the service for *one-fourth of a cent* and the other for *one cent*: Held that the latter is the only bid of the two which is entitled to acceptance.

DEPARTMENT OF JUSTICE,

July 6, 1872.

SIR: I have the honor to acknowledge the receipt of your communication of the 21st ultimo, from which it appears that among other bids, not necessary to notice, the following were made for mail-service from July 1, 1872, to July 1, 1876, on route 3005, from Uniontown to Washington, to wit:

Alfred Newton, 1 cent.

R. H. Brimmer, $\frac{1}{4}$ cent.

Samuel Teasdale, $\frac{1}{4}$ cent.

Brimmer, it seems, was the person to whom the contract for the preceding four years' service on this route was awarded; but Newton represents that he has carried the mail during that time over said route, under a purchase from Brimmer, and that he would sustain great loss now if the contract for the ensuing four years is denied to him.

Mail-Transportation.

You submit for my opinion as to whether or not the bid of one cent and each of those for a quarter of one cent can be treated as of the same value, and whether or not your Department is at liberty, if in its judgment advisable, to award the contract to the former contractor.

Section 18 of the act of March 3, 1845, (5 Stat., 738,) makes it the duty of the Postmaster-General "in all lettings of contract for mail transportation to let the same in every case to the lowest bidder tendering sufficient guarantee for the faithful performance," &c.

Literally, as between Newton and Brimmer, Brimmer is the lowest bidder, but the statute referred to must receive a reasonable and practical construction. When the circumstances are such that one-fourth of one cent can be multiplied in a computation for payment, the difference between the two bids would be of consequence; but Brimmer proposes to do a certain quantity of work for the specific amount of one-fourth of one cent, with a right, of course, to call for payment when the work is performed. There is no denomination of money with which such a payment can be made, and after a quarter's services, and the refusal or inability of the Government to pay for them on demand, Brimmer might, upon that ground, claim the right to abandon the contract. Necessarily, there must be a limitation upon the descending scale of bids, and if it be not one cent, the lowest and least valuable form of money in circulation, then it may be a mill or one-half of a mill, and so on *ad infinitum*.

My opinion is that one cent is the lowest bid that can be recognized, and that the Government is not bound to enter into a contract which it cannot perform. Newton's bid, in my judgment, is the only valid bid of the three mentioned, and the contract ought to be awarded to him. *De minimis non curat lex* is a familiar maxim of law, applicable to the question in this case.

I have the honor to be, sir, your obedient servant,

GEO. H. WILLIAMS.

Hon. JNO. A. J. CRESWELL,

Postmaster-General.

Printed Drawings of Patents.

PRINTING DRAWINGS OF PATENTS.

By act of March 3, 1871, chap. 113, an appropriation was made to meet (*inter alia*) the expense of publishing specifications and drawings required by the Patent-Office during the year ending June 30, 1872; the appropriation was to be disbursed by the Superintendent of Public Printing, under whose direction the execution of the work mentioned was then placed; but by the act of March 24, 1871, chap. 5, the Joint Committee of Congress on Printing was authorized to transfer the direction of the work to the Commissioner of Patents, should it be deemed expedient to do so, and on the 16th of June, 1872, such transfer was made: *Held* that, notwithstanding the transfer of the direction of the work, the appropriation was still applicable to the payment of expenses incurred in its prosecution, and might therefore be employed by the Superintendent of Public Printing in payment of work done under the direction of the Commissioner of Patents; *yet held, also*, that under section 5 of the act of July 12, 1870, chap. 251, the appropriation having been made specifically for the fiscal year ending June 30, 1872, was only applicable to expenses incurred during that year, or to the fulfillment of contracts made within the same period.

DEPARTMENT OF JUSTICE,
July 13, 1872.

Your letter of the 8th instant referred to me a communication addressed to you by the Acting Commissioner of Patents, Mr. Thacher, suggesting a question in regard to the printing of the specifications and drawings of patents.

The case presented by the Acting Commissioner is substantially this: By the act of March 3, 1871, providing for the legislative, executive, and judicial expenses of the Government for the year ending June 30, 1872, the sum of \$91,000 was appropriated for the "lithographing, engraving, mapping copies of maps, plans, and diagrams in fac simile on tracing-linen." (16 Stat., 478.) This appropriation was to be disbursed by the Superintendent of Public Printing, and was designed to meet expenses incurred for publishing specifications and drawings required by the Patent-Office under the provisions of the joint resolution of January 11, 1871, (16 Stat., 590,) as well as for lithographing, engraving, &c., required by other Departments of the public service.

The execution of the work for the Patent-Office, by the

Printed Drawings of Patents.

terms of that resolution, was placed under the direction of the Superintendent of the Public Printing. But by the 1st section of the act of March 24, 1871, (17 Stat., 2,) it was enacted, "that if, in the judgment of the Joint Committee on Printing, the provisions of the joint resolution providing for the publishing specifications and drawings of the Patent-Office, approved January 11, 1871, can be performed under the direction of the Commissioner of Patents more advantageously than in the manner provided in said joint resolution, it shall be so done, under such limitations and conditions as the Joint Committee on Printing may, from time to time, prescribe." And on the 10th of June, 1872, the said joint committee determined that the publication of such specifications and drawings could be more advantageously made under the direction of the Commissioner of Patents, to whom the same was accordingly transferred, subject to certain limitations and conditions which it is unnecessary to here state.

Upon this, I understand, the question has arisen whether, since the transfer of the direction of the work referred to, made by the joint committee, as aforesaid, the above-mentioned appropriation is still applicable to the payment of expenses incurred in the prosecution of that work; that is to say, work done or that may be done under the direction of the Commissioner of Patents.

The mere transfer of the direction of the said work from one office to another does not, as I conceive, affect the applicability of that appropriation or divert it from any of the objects for which it was intended. The appropriation, after the transfer, still remained the proper and the only fund out of which the expenses of the work were payable, and might still be disbursed by the Superintendent of Public Printing for that purpose. Yet it is to be observed that the appropriation was made specifically for the service of the fiscal year ending June 30, 1872, and that under the 5th section of the act of July 12, 1870, (16 Stat., 251,) it can only be applied to the payment of expenses properly incurred during that year, or to the fulfillment of contracts properly made within that year. Subject to these restrictions, then, I am of the opinion that the appropriation may be employed by the Superintendent of Public Printing in payment of work of the

American Atlantic Cable Telegraph Company.

I perceive nothing in the act of 1872 that enlarges the field of selection, or that renders the restriction just adverted to inconsistent with its provisions. Under this statute the board may change the present site, but in doing so they cannot, I think, locate it on any other ground than such as is owned by the Government, within the limits of the city of Washington.

Besides, the absence of any appropriation under the control of the board with which to effect the purchase of another site negatives the idea that such a power was intended to be given it. The appropriation placed in charge of the Secretary of the Interior is not available for that purpose. This appropriation is directed to be expended by him in the "construction of a jail;" terms which cannot be taken to impart an authority to purchase a site therefor. As confirmatory of this view, I may refer to the 4th section of the act of March 2, 1867, (14 Stat., 466,) from which it would seem that Congress deemed it necessary to expressly authorize the Light-House Board to purchase the necessary land in cases where an appropriation is made for a new light-house the proper site for which does not belong to the United States, and also to an opinion of one of my predecessors touching the construction of an appropriation made for permanent defenses at Narragansett Bay. (11 Opin., 201.)

I have the honor to be, very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. C. DELANO,
Secretary of the Interior.

AMERICAN ATLANTIC CABLE TELEGRAPH COMPANY.

The act of March 29, 1867, chap. 15, conferring certain rights and privileges upon the American Atlantic Cable Telegraph Company, does not preclude Congress from at any time conferring similar rights and privileges upon any other company.

The establishment of telegraphic lines connecting the United States with other countries properly falls under the regulative power of Congress; but that body has as yet made no general regulations on the subject.

American Atlantic Cable Telegraph Company.

The act of July 24, 1866, chap. 230, was intended to apply to interior lines of telegraph—that is to say, those established between points within the United States—and not to exterior oceanic lines designed for communication with foreign lands.

DEPARTMENT OF JUSTICE,

July 22, 1872.

SIR: I have had under consideration the communication addressed to you, on the 9th instant, by the Hon. S. C. Pomeroy, vice-president of the American Atlantic Cable Telegraph Company, which you were pleased to refer to me for my views upon the subject to which it relates.

In that communication I do not find any particular point or question presented, other than what is contained in a request on the part of the writer for the expression of an opinion as to the rights generally of the aforesaid company, under the act of March 29, 1867, (15 Stat., 10.) This act reads:

“Be it enacted, &c., That the American Atlantic Cable Telegraph Company of New York be, and are hereby, vested with the right, power, and privilege, having acquired the necessary land therefor, to lay, land, and operate their cable or cables on the Atlantic coast, except on the coast of Florida, within the jurisdiction of the United States, and the right, power, and privilege so to lay, land, and operate their cable or cables shall be vested in the said American Atlantic Cable Telegraph Company for the period of twenty years from the approval of this act: Provided, That the said company shall commence active operations within the space of two years from the approval of this act.

“SEC. 2. And be it further enacted, That the American Atlantic Cable Telegraph Company, having acquired the necessary land therefor, shall have the right, power, and privilege to lay, land, and operate their cable or cables, within any of the harbors, waters, inlets, and cities on the Atlantic coast, except the coast of Florida, offering the most practical and convenient landing, and to construct or erect all the necessary fixtures to accomplish the object of this act.

“SEC. 3. And be it further enacted, That the Government of the United States shall at all times have the preference in its use, upon terms that may be agreed upon between the Postmaster-General and the said company.

American Atlantic Cable Telegraph Company.

"SEC. 4. And be it further enacted, That Congress shall have power to alter, amend, or repeal this act."

If "active operations," such as the act contemplates, have been commenced by the company within the period required by the proviso to the 1st section, it may be regarded as now possessing all the rights and privileges conferred by the act, at least so far as Congress has power to confer them. What these are, can be best described in the language of the act itself. They are, "to lay, land, and operate their cable or cables on the Atlantic coast, except the coast of Florida, within the jurisdiction of the United States," for the period of twenty years from the date of the act; and to lay, land, and operate the same "within any of the harbors, waters, inlets, towns, and cities on the Atlantic coast, except the coast of Florida, offering the most practical and convenient landing, and to construct and erect all the necessary fixtures to accomplish the object of this act."

I do not, however, construe that act as giving to the company exclusive rights and privileges, so as to preclude Congress from at any time conferring similar rights and privileges upon any other company. Indeed, that body has expressly reserved the power to alter, amend, or repeal the act at pleasure.

That telegraphic lines connecting the United States with other countries are a subject which properly falls under the regulating power of Congress, I entertain no doubt. Yet Congress has provided no general regulations concerning it. The act of July 24, 1866, entitled "An act to aid in the construction of telegraphic lines," &c., (14 Stat., 221,) authorizes any telegraph company, under certain conditions, to construct, maintain, and operate lines of telegraph "over and across the navigable streams or waters of the United States." But it is manifest that this act was intended to apply simply to interior lines of telegraph designed for communication between points within the United States, and not to exterior oceanic lines designed for telegraphic intercourse with foreign lands. The only legislation relating to the subject which we have is the act of March 29, 1867, already quoted, and the earlier act of May 5, 1866, (14 Stat., 44,) granting the right of establishing a line from the coast of

Accounting-Officers of the Treasury.

Florida to the West Indies ; and these acts, while they confer privileges upon the companies named therein, contain no provisions of a general character affecting third parties or the public at large.

I have the honor to be, &c.,

GEO. H. WILLIAMS.

The PRESIDENT.

ACCOUNTING-OFFICERS OF THE TREASURY.

The act of March 30, 1868, chap. 36, authorizes the head of a Department before signing a warrant for any balance certified by a Comptroller, to submit to the latter any facts which in his judgment affect the correctness of such balance ; but it makes the decision of the Comptroller thereon final and conclusive upon the executive branch of the Government, and subject to revision by Congress or the proper courts only.

DEPARTMENT OF JUSTICE,

July 22, 1872.

SIR: I have the honor to acknowledge the receipt of your letter requesting my opinion as to the effect of the act of March 30, 1868, entitled "An act to amend an act to provide for the prompt settlement of public accounts," approved March 3, 1817, with respect to the discretion of the Secretary of War in making a requisition or drawing a warrant for money, whether, as in your particular statement of the question, the act "overthrows the theory that the Department of War, in so far as appropriations under it are concerned, is to be a check upon the Treasury accounting-officers ; or, in other words, whether the Secretary of War has no power over the action of the accounting-officers, in order, when necessary, to protect the appropriations made by Congress on his own estimates or confided to his care."

The question of the finality of the decisions of Comptrollers of the Treasury in the adjustment of the public accounts, has on several occasions been referred to the Attorney-General, and in every instance, except one, the opinion rendered has declared the decisions of those officers to be subject to review and reversal by the Secretary of the Treasury, and also by each of the other heads of Departments, in cases originating in or concerning the appropriations for the branch of the public service confided to his charge.

Accounting-Officers of the Treasury.

It is only necessary for the purpose of this communication to refer particularly to two of those opinions: that of Attorney-General Wirt, in the case of Wheaton, (1 Opin., 624,) and the opinion of Attorney General Crittenden, (5 Opin., 630.) In the latter, all of the previous opinions are referred to, the subject of the jurisdiction of the accounting-officers of the Government is fully and elaborately discussed, and the following deductions are made:

1. "That the heads of Departments have a rightful authority to direct allowances to be made or to reject claims for allowances in settling and adjusting accounts relating to the business of their respective Departments, and that such directions and rejections ought to be conformed to by the Auditors and Comptrollers and Commissioner of Customs respectively."

2. "That the Secretary of the Treasury is not bound to grant warrants for issuing money from the Treasury for whatever balances the Auditors and Comptrollers and Commissioner of Customs may state and certify; but as the head of the accounting-officers of the Treasury Department, as the Secretary of the Treasury and head of the Department, he has the rightful authority to cause accounts to be re-formed, re-adjusted, and settled according to his judgment of the right and justice of the case."

This opinion of Mr. Crittenden, which is in harmony with those of his predecessors, except that of Mr. Wirt above mentioned, has been accepted as conclusive by each of his successors to whom the subject has been in any form referred, and the practice has, with the occasional instance of conflict as to the relative jurisdiction of the accounting-officers and the heads of Departments, indicated in these several opinions, conformed to the conclusions above stated.

The opinion of Attorney-General Wirt, in which the conclusions reached are precisely the opposite of those stated in the opinion of Mr. Crittenden, was upon the question whether an appeal would properly lie from the decision of a Comptroller to the President; and he takes occasion therein to define the nature and extent of the jurisdiction of the accounting-officers of the Treasury Department. After showing the constitutional duties of the President to be inconsistent with such proceeding, he goes on to show from the act of 1789,

Accounting-Officers of the Treasury.

organizing the Treasury Department, the act of March 3, 1809, "to further amend the several acts establishing and regulating the Treasury, War, and Navy Departments," and the act of March 3, 1817, by which the present organization of the Treasury Department was established, that the decision of the Comptroller is final, and that the law contemplates no further examination *by any officer* after such decision. He says, (pp. 626, 627,) "In the original organization of the Treasury Department the duties of the officers are designated specifically. There was one Auditor and one Comptroller. The duty of the Auditor is declared to be to receive all public accounts, and after examination to certify the balance and transmit the accounts with the vouchers and certificate to the Comptroller for his decision thereon, with this *proviso*, that if any person be dissatisfied therewith, he may within six months appeal to the Comptroller against such settlement. *Here the right of appeal stops.* There is no proviso for an appeal to the President.

"With regard to the Comptroller, it directs that it shall be his duty to superintend the adjustment and preservation of all public accounts, to examine all accounts settled by the Auditor, and certify the balances arising thereon to the Register; no right of appeal from his decision to the President. With regard to the Register, it directs him to receive from the Comptroller the accounts which shall have been *finally* adjusted, and to preserve such accounts with their vouchers and certificates. So, also, the act of 3d March, 1817, which introduces the present organization of the Treasury Department, and under which Major Wheaton's accounts have been settled, assigns to the Third Auditor the duty of receiving all accounts relative to the subsistence of the Army, the Quartermaster's Department, and generally all accounts of the War Department other than those provided for by the act. It makes it the duty of the Second Comptroller to examine all accounts settled by the Third Auditor, and it makes it the duty of the Third Auditor to keep the accounts which shall have been finally adjusted, and to preserve such accounts.

"Thus, in every instance, the decision of the Comptroller is declared to be final, and it is manifest that the law contem-

Accounting-Officers of the Treasury.

plates no further examination by any officer after such decision."

And on page 629, he says: "My opinion is, that the settlement made of the accounts of individuals by the accounting-officers appointed by law is final and conclusive, *so far as the executive department of the Government is concerned*. If an individual considers himself injured by such settlement, *his recourse must be to one of the other two branches of Government, the legislative or judicial.*"

These references to the opinions of Mr. Wirt and Mr. Crittenden may serve to indicate the grounds upon which question as to the jurisdiction of the Treasury accounting-officers has from time to time occurred. Congress, in framing the act of March 30, 1868, is presumed to have had in view the several statutes relating to the subject, and the interpretation in this respect given to them by successive law-officers of the Government, as also the practice which had always obtained in the settlement of the public accounts.

This act would seem to have been framed with the intent to settle all doubts upon the subject, and fully accords with the theory maintained in the opinion of Mr. Wirt. Its terms are very direct and explicit. It provides that the act of March 3, 1817, *shall not be construed* to authorize the heads of Departments to *change or modify* the balances that may be certified to them by the Commissioner of Customs or the Comptrollers of the Treasury, but that such balances shall be taken and considered as *final and conclusive* upon the *executive* branch of the Government, and be subject to revision *only by Congress or the proper courts*.

These provisions of the act are so unequivocal and clear that it seems to me any attempt to make them more so by comment would be superfluous. If there could be any doubt of their meaning the *proviso* added should effectually remove it. This is to the effect that the head of the proper Department, before signing a warrant, or any balance certified by a Comptroller, may submit to that officer any facts in his judgment affecting the correctness of the balance, but that the decision of the Comptroller thereon *shall be final and conclusive*.

It will be perceived, therefore, that, whereas heretofore the

Missouri River, Fort Scott and Gulf Railroad Co.

question occasionally arose whether an appeal can lie from the decision of a Comptroller to a head of a Department, this act provides that heads of Departments may submit to the Comptroller their objections to his decisions, but that the Comptroller's ultimate decision cannot be revised or reversed by them; that this can only be done by the legislative or judicial department of the Government.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,

Secretary of War.

MISSOURI RIVER, FORT SCOTT AND GULF RAILROAD COMPANY:

Construction of the act of July 25, 1866, chap. 241, granting lands to the State of Kansas to aid in building the Kansas and Neosho Valley Railroad, which road subsequently came into the ownership of the Missouri River, Fort Scott and Gulf Railroad Company.

That company is not entitled to compensation from the Government for transportation performed over said road, notwithstanding there may have been no notice given by the Government to the company, previous to the performance of the transportation, that it was to be done at the latter's expense.

DEPARTMENT OF JUSTICE,

July 25, 1872.

SIR: I have the honor to acknowledge the receipt of your letter of the 19th instant, in which you ask my opinion whether, under the act of July 25, 1866, entitled "An act granting lands to the State of Kansas to aid in the construction of the Kansas and Neosho Valley Railroad," &c., the Missouri River, Fort Scott and Gulf Railroad Company, successor to the Kansas and Neosho Valley Railroad Company, is obliged "to transport troops, munitions of war, supplies, and public stores upon its road for the Government, when required to do so by any Department thereof, at the cost, charge, and expense" of the company, unless upon requisition for such transportation notice is specifically given by the Government to the company that the service demanded is to be performed at the expense of the company.

This notice appears to be claimed by the company as essential in virtue of the first sentence of the 3d section of the act,

Missouri River, Fort Scott and Gulf Railroad Co.

which is in the words following: "That the grant of lands hereby made is upon condition that said company, after the construction of its road, shall keep it in repair and use, and that (it will) at all times be in readiness to transport troops, munitions of war, supplies, and public stores upon its road for the Government, when required to do so by any Department thereof, at the cost, charge, and expense of said company."

Admitting the plausibility of the claim made by the railroad company, I am constrained to conclude that the company's construction of the act in question does not comport with the intent of Congress in its passage.

Two ideas may be attached to the words "when required to do so by any Department thereof," contained in the section cited. One is, that the liabilities of the company are to be measured by the necessities of the Government, and the other is, that the company is only bound to transport troops and public stores when called on for that purpose by the Government, and not at the instance of unauthorized parties. I cannot persuade myself that Congress intended to confer upon any officer or Department of the Government power to pay one land-grant railroad for transportation and refuse payment to another, at discretion; which would be the case if the company was liable or not, as the notice might or not be given at the time of its employment.

I do not see that the notice contended for is necessary, so far as the interests of the company are concerned; for when transportation is required by the Government the same labor and expense are devolved upon the company with or without the notice. Probably if it was intended that the Government should, in any case, pay for the transportation provided for, the act would also have provided that the Government should not be charged higher rates for the service than those charged to private parties.

Whether the company received more or less land, and whether vouchers were given or not by the officer or Department at whose instance the services were rendered, are not material considerations; for the company accepted the grant made by the act with all the conditions thereby imposed, and the question, therefore, is wholly one as to the effect of that

Re-imbursement of Expenses.

act. Giving to it what appears to me to be a natural and reasonable construction, the company is not entitled to compensation from the Government for the transportation described in its claim.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,

Secretary of War.

RE-IMBURSEMENT OF EXPENSES.

An internal-revenue officer, while in pursuit of an escaped prisoner, shot and killed the latter, for which the officer was indicted in a State court, tried, and acquitted; and having sustained a considerable outlay in his defense, he afterward presented at the Treasury a claim against the Government for re-imbursement of the amount: *Advised* that there is no law authorizing the re-imbursement.

DEPARTMENT OF JUSTICE,

July 26, 1872.

SIR: I have received your letter of the 24th instant, inclosing a letter to you from the Commissioner of Internal Revenue, with papers inclosed relative to the refunding of \$1,700 expenses incurred by late deputy collector and deputy United States marshal W. B. Whitmore, and requesting my opinion as to the propriety of allowing the amount claimed.

The case, stated in the papers, I find to be as follows: That Mr. Whitmore, acting as deputy United States marshal, arrested a party engaged in illicit distillation in Caloosa County, Georgia; that the arrest was by due process of law; that the prisoner resisted and attempted to escape from the officer, who pursued, and, after repeated warning, shot and killed him. Whitmore was thereupon indicted for murder in a State court, was tried and acquitted. He paid the expenses of his defense to the amount above stated, and presents vouchers for the same, asking to have the amount refunded to him.

Not finding any law authorizing the re-imbursement asked by Mr. Whitmore, I see no recourse for him except to Congress for the passage of a special act.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. GEO. S. BOUTWELL,

Secretary of the Treasury.

Trusses for Disabled Soldiers.

TRUSSES FOR DISABLED SOLDIERS.

By the act of May 28, 1872, chap. 228, entitled "An act to provide for furnishing trusses to disabled soldiers," Congress designed to furnish soldiers of the Union Army, who were ruptured while in the line of duty, with the best truss that could be procured; but left it discretionary with the Surgeon-General to adopt one style, or different styles, always keeping in view, however, the selection of that which in his judgment is best adapted to the particular case for which it is intended.

DEPARTMENT OF JUSTICE,

July 30, 1872.

SIR: I have the honor to acknowledge the receipt of your letter of the 20th instant, with its inclosures.

On the 28th day of May, 1872, Congress passed an act entitled "An act to provide for furnishing trusses to disabled soldiers," the 1st and 2d sections of which read as follows:

"That every soldier of the Union Army who was ruptured while in the line of duty, during the late war for the suppression of the rebellion, shall be entitled to receive a single or double truss, of such style as may be designated by the Surgeon-General of the United States Army as the best suited for such disability."

"That application for such truss shall be made by the ruptured soldier to an examining-surgeon for pensions, whose duty it shall be to examine such applicant, and for every such applicant, found to have a rupture or hernia, shall prepare and forward to the Surgeon-General an application for such truss, without charge to the soldier."

To carry out the provisions of this act, the Surgeon-General convened a board of medical officers to examine the trusses submitted to them, who, after examination, reported that the trusses, a sample of which was submitted by Bartlett, Butman & Parker, and also the Chase truss, were the best adapted for the purposes indicated in the act, which report was approved by the Surgeon-General. The Banning Truss Company object to this report on the ground that the Surgeon-General has no power under the act to designate more than one style of truss, which must be the best in use, and that their truss answers this description; and my opinion is asked upon the question thus presented.

Trusses for Disabled Soldiers.

Every applicant under the act in question is to be examined by a surgeon for pensions, who, if such applicant is found to have a rupture or hernia, is required to apply for a truss to the Surgeon-General, whose duty it is to furnish such applicant the one best suited to his disability. I see nothing in the act which requires the Surgeon-General to adopt and use in all cases the truss manufactured by any person or company, unless in his judgment that truss is the best suited for all cases. No doubt the Surgeon-General is bound to furnish the truss best suited to the disability of the applicant; but that duty involves, of course, a decision as to the peculiarities of the disability, and the suitableness of the truss for such peculiarities, which decision he can make, if he chooses, in each case as it arises. If one style is best suited to all cases of hernia or rupture, then I think the Surgeon-General is bound to furnish that style; but if one style is best adapted to a case or class of cases, and a different style is best adapted to another case or class of cases, then, in my opinion, he is at liberty to use the style meeting this requirement.

Congress intended, as it seems to me, to furnish soldiers of the Union Army who were ruptured while in the line of duty with the best truss that could be procured, but at the same time it is left discretionary with the Surgeon-General to adopt one style in all cases, or he may furnish different styles in different cases; but always the style best suited to the circumstances of the case in which it is furnished.

The Banning Company claim that their truss is the best suited for all disabilities of hernia or rupture; and if that be so, then the act makes it the duty of the Surgeon-General to furnish trusses of that style. But whether it is the best suited to all such disabilities, or whether it is the best suited to any such disabilities, or whether the two styles approved by the board of medical officers are the best suited to any or all of such disabilities, are questions for the Surgeon-General to decide, and upon which I am not at liberty to express any opinion.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

HON. WM. W. BELKNAP,

Secretary of War.

Private Land-Claims in California.

PRIVATE LAND-CLAIMS IN CALIFORNIA.

A survey of a private land-claim in California was made in 1867, and forwarded by the surveyor-general for that State to the Commissioner of the General Land-Office, who approved the same, but from whose decision an appeal was taken to the Secretary of the Interior, by whom the survey was disapproved and a new one ordered, which has not been made: *Held*, upon these facts, that it was competent to the successor in office of the Secretary who ordered the new survey to set aside or revoke that order.

DEPARTMENT OF JUSTICE,

August 2, 1872.

SIR: I have the honor to acknowledge the receipt of your letter of the 30th ultimo, submitting certain inquiries for my opinion, to the consideration of which the following are the material facts as stated by you:

In September, 1867, a survey was made of the Rancho Rio de Santa Clara, in California. Due advertisement of this survey was made in November and December of the same year. Exceptions were made to it and overruled by the surveyor-general. The papers were forwarded by him to the Commissioner of the General Land-Office, with the recommendation that a patent issue to Valentine Cota *et al.*, confirmees under the act of July 1, 1864, (13 Stat., 332.) This survey was approved by the Commissioner. An appeal was taken to your immediate predecessor in office, by whom, on the 15th of June, 1870, that survey was disapproved and a new one ordered, in which the boundaries of the claim were described. No new survey has been made.

You inquire as follows:

"1st. Does the action of my predecessor conclude me from entertaining the motion for a rehearing, and am I bound by his decision, although my own judgment may not agree with his?"

"2d. Does the fact that the parties in interest have submitted new and material evidence, which would probably have changed the decision of my predecessor had it been before him, justify me in entertaining the motion for a rehearing, although it may be doubtful whether such new evidence is technically such newly-discovered evidence as could not have been known by the use of due diligence?"

Private Land-Claims in California.

Provision is made for the survey of private land-claims in California by said act of July 1, 1864. When the surveyor-general of that State has acted in reference to such a survey according to the directions of the act, he is required to transmit the papers and proofs filed with him, with his opinion thereon, to the Commissioner of the General Land-Office, who is empowered to approve or disapprove the survey made, or to direct a new survey. When a survey, made in conformity to the directions of the Commissioner, has been approved by him, it is made his duty, as soon thereafter as practicable, to cause a patent to be issued to the claimant of the land.

To decide the question submitted by you, it is not necessary to decide what power, if any, the Commissioner has, after he has finally approved a survey, to modify or revise that decision. But my opinion is that the Commissioner has power to make any order or decision he may deem proper, and at pleasure to modify orders and decrees made by himself or his predecessor, prior to the decision by which the survey is finally approved. The preliminary or interlocutory decisions, after the Commissioner acquires jurisdiction and before final judgment, are open to reversal. To obtain a survey that can be finally approved is the object of all the proceedings, and nothing is accomplished for the benefit of the person owning the land until that end is attained.

On appeal, your predecessor, it appears, disapproved the survey of the land in question which had been approved by the Commissioner, and ordered a new survey. Justice Catron says, in delivering the opinion of the court in *Maguire vs. Tyler*, (1 Black, 202,) "that the jurisdiction to revise on appeal was necessarily co-extensive with the power to adjudge by the Commissioner," and therefore, if my views as to the powers of the Commissioner are correct, it follows that you are at liberty for any reasons satisfactory to yourself to adopt or reverse the order for a new survey made by your predecessor. Should the new survey be made as ordered, you certainly have the power, if the subject is properly presented, to disapprove it, and so in effect reject the order of your predecessor, and it is obvious that no such circuitous action is necessary to reach that result if you are now satisfied,

Retired Pay of Surgeon-General Finley.

from new evidence or otherwise, that the order was erroneous and ought not to be executed.

I hold, therefore, that you have the right to affirm or rescind the order for a new survey made by your predecessor, and that, with due regard, of course, to the interests of all concerned and subject to the rules of practice in your Department, you are at liberty to consider any evidence that may aid you in reaching a correct conclusion.

I express no opinion as to whether or not you have the power to set aside an order made by a predecessor in office finally approving a survey, though the cases of *Maguire vs. Tyler*, (1 Black, 202,) and *Maguire vs. Tyler*, (8 Wall., 650,) would seem to countenance the existence of that power.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. C. DELANO,
Secretary of the Interior.

RETIRED PAY OF SURGEON-GENERAL FINLEY.

Under the act of August 3, 1861, chap. 42, Surgeon-General C. A. Finley was, upon his own application, by an order from the War Department, issued by direction of the President on the 23d of April, 1862, placed upon the retired-list of the Army, to date from April 14, 1862; and, by the same act, any officer retired thereunder was to be allowed "the pay proper of the highest rank held by him at the time of his retirement whether by staff or regimental commission, and four rations per day," without any other pay, emoluments, or allowances.

In enacting that provision, Congress acted on the supposition that the compensation of all officers consisted of what is termed "pay proper" and certain emoluments besides, such as commutation for service rations, &c.; and the limitation of "four rations per day" was designed to operate solely in diminution of those emoluments.

But the compensation of the Surgeon-General consisted of a stated annual salary, without any emoluments of the kind referred to, and the rank held by him, not being assimilated by law to any particular grade in the Army, was indicated only by the title of his office.

Held, therefore, that Surgeon-General Finley became entitled, on his retirement, to the annual salary which he previously received, that being the pay proper of the highest rank held by him, but not to four rations per day in addition thereto, as the allowance of these would be inconsistent with the purpose of the limitation mentioned.

Retired Pay of Surgeon-General Finley.

DEPARTMENT OF JUSTICE,

August 2, 1872.

SIR: I have had the honor to receive your letter of the 26th of June last, covering a communication from the Second Comptroller relative to the retired pay of Surgeon-General Clement A. Finley, and presenting for my consideration the following question: "Has he (Surgeon-General Finley) a legal title to the yearly salary which he received before retirement; or is he restricted to the pay proper of a colonel of cavalry, viz., \$110 per month and four rations per day?"

It appears that by an order issued from the War Department, dated April 23, 1862, the President directed that the name of Surgeon-General Finley be placed upon the retired-list of the Army, to date from April 14, 1862, he having applied to be retired from active service after more than forty years' service. This was under the provisions of the act of August 3, 1861, (12 Stat., 287,) the 15th and 16th sections of which enact:

(15.) "That any commissioned officer of the Army, or of the Marine Corps, who shall have served as such for forty consecutive years, may, upon his own application to the President of the United States, be placed upon the list of retired officers, with the pay and emoluments to be allowed by this act."

(16.) "That if any commissioned officer of the Army, or of the Marine Corps, shall have become, or shall hereafter become, incapable of performing the duties of his office, he shall be placed upon the retired-list and withdrawn from active service and command, and from the line of promotion, with the following pay and emoluments, namely, the pay proper of the highest rank held by him at the time of his retirement, whether by staff or regimental commission, and four rations per day, and without any other pay, emoluments, or allowances; * * * *Provided*, That, should the Brevet Lieutenant-General be retired under this act, it shall be without reduction in his current pay, subsistence, or allowances. *And provided further*, That there shall not be on the retired-list at any one time more than seven per centum of the whole number of officers of the Army as fixed by law."

Retired Pay of Surgeon-General Finley.

By the 2d section of the act of April 14, 1818, entitled "An act regulating the staff of the Army," (3 Stat., 426,) the office of Surgeon-General was created, with "a salary of \$2,500 per annum," and it was retained by the 10th section of the subsequent act of March 2, 1821, fixing the military peace establishment of the United States, (3 Stat., 616,) without any change with regard to the compensation provided therefor. That remained thenceforth the same in amount until, by virtue of the 1st section of the act of February 21, 1857, (11 Stat., 163,) it was increased to \$2,740, at which figure it stood on the 14th April, 1862, the date of Surgeon-General Finley's retirement. During this period the Surgeon-General was not entitled to commutation for rations, forage, or any other *emolument* whatever, with the exception of the longevity-rations allowed by the act of July 7, 1838, (5 Stat., 308,) supplementary to the act of July 5, 1838, (5 Stat., 256.)

The 8th section of the act of February 11, 1847, (9 Stat., 125,) declares, "that the rank of the officers of the Medical Department of the Army shall be arranged upon the same basis which at present determines the amount of their pay and emoluments." This is the only legislative provision regulating the rank of officers of the Medical Department which was in force on the 14th of April, 1862, when Surgeon-General Finley was retired. But it was not, I think, applicable to the Surgeon-General.

The 10th section of the act of 1821, cited above, had provided that (besides one Surgeon-General) the Medical Department should consist of eight surgeons, with the compensation of regimental surgeons, and forty-five assistant surgeons, with the compensation of post surgeons. Subsequently, by the act of June 30, 1834, (4 Stat., 714,) surgeons became entitled to the pay and emoluments of a major, and assistant surgeons having served five years to the pay and emoluments of a captain, and those of less than five years to the pay and emoluments of a first lieutenant. The line officers here referred to are to be understood as officers of *infantry*, so that the compensation of surgeons and assistant surgeons was by the last-named act made to conform to the pay and emoluments of a major, captain, or lieutenant of infantry, as the case might be. It was afterward provided by the 24th section of the act

Retired Pay of Surgeon-General Finley.

of July 5, 1838, (5 Stat., 259,) that officers of the Medical Department should receive the pay and emoluments of officers of *cavalry*, of the same grades, respectively, according to which they were then paid by the then existing laws.

Now, it would seem that the design of the provision above quoted from the 8th section of the act of February 11, 1847, was merely to give those officers of the Medical Department, whose compensation was determined by reference to the pay and emoluments of line-officers of the cavalry, as before mentioned, the rank of the latter officers. It could not have been intended to embrace the Surgeon-General, as his compensation was not established with reference to, or based upon, the pay and emoluments of any specified rank in the line of the Army, but appears to have been fixed irrespective thereof. Indeed, from the time of the creation of the office of Surgeon-General, in 1818, down to the date of the retirement of Surgeon-General Finley, the rank of that office does not seem to have even been fixed or regulated by statute; I mean relatively to lineal rank in the Army.

In the Army Regulations of 1821 the Surgeon-General is not regarded as an officer clothed with rank assimilated to that of the line, (see art. 2, par. 5, p. 14;) so also in the regulations of 1825, (see art. 2, par. 7, p. 14.) However, by the Army Regulations of 1835, he, along with two other staff-officers "without military rank," is classed as a colonel, (see art. 2, p. 2;) and by the Army Regulations of 1841 he is likewise classed as a colonel, (see art. 2, par. 5, p. 2.) The subsequent regulations, down to 1861, do not in express terms preserve this classification; but the Army Register for the same period, in the list of officers of the Medical Department, mentioned the "Surgeon-General with the rank of colonel."

Yet, in the absence of some legislative provision establishing, or at least recognizing, the rank of the Surgeon-General, within the period referred to, as that of a colonel, (and I am not aware of any such provision,) I do not regard the simple fact that he has been so classed in the Army Regulations as warranting the conclusion that, in contemplation of the 16th section of the act of August 3, 1861, *supra*, he is to be considered as an officer *holding* that rank. For the grade or

Retired Pay of Surgeon-General Finley.

rank of officers in the Army is determined by statute and not by executive regulations, and hence, from a legal point of view, they must be deemed to be clothed with such rank, and such only, as Congress has attached to their offices respectively.

Thus, during the period mentioned, the Surgeon-General cannot properly be said to have held the rank of colonel, or, indeed, any other rank, except that which, as chief of the Medical Department, appertained to the office itself, and which is to be regarded as superior to that of the other officers in the same Department. His rank was *sui generis*; it was, so to speak, that of the Surgeon-General alone.

From the foregoing it is evident that no authority exists for restricting the retired compensation of Surgeon-General Finley to the pay proper of a colonel of cavalry and four rations per day; he not having held that rank in contemplation of law at the time of his retirement.

The provision in the act of August 3, 1861, under which only is his compensation allowable, gives the retired officer "the pay proper of the highest rank held by him at the time of his retirement, &c., and four rations per day," &c. Here it is obvious that Congress acted upon the supposition that the compensation of all officers of the Army consisted of what is termed "pay proper," and certain emoluments besides, such as commutation for service rations, &c., and the limitation of "four rations per day" was manifestly designed to operate in diminution of these emoluments. But, as has been already shown, the compensation of the Surgeon-General consisted of a stated salary, which may be denominated his pay proper, *without any emoluments of the kind referred to*, and the highest rank held by him is indicated only by the title of his office. Under these circumstances the compensation to which he would become entitled on retirement would seem to be the salary which he had previously received, that being the pay proper of the highest rank held by him, but not in addition thereto the four rations per day; as to allow these also would be inconsistent with the plain purpose of the provision in which they are named.

I understand that from the date of his retirement in April, 1862, up to the present time, Surgeon-General Finley has

Limitations under Internal-Revenue Laws.

been allowed the annual salary which he received before he was retired, without the four rations. In my opinion that is the retired pay to which he is legally entitled under the act of August 3, 1861.

I return herewith the papers which accompanied your letter.

I am, sir, with great respect, your obedient servant,
GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,
Secretary of War.

LIMITATIONS UNDER INTERNAL-REVENUE LAWS.

The various statutes passed by Congress, applicable to civil and criminal proceedings under the internal-revenue laws, reviewed, and the following result reached :

1. That the 3d section of the act of March 26, 1804, chap. 40, furnishes the law of limitation as to all *criminal proceedings* under the internal-revenue acts, the period within which such proceedings must be commenced being five years.
2. That the same section perhaps, or, if not, then certainly the 4th section of the act of February 28, 1839, chap. 36, furnishes the law of limitation as to all proceedings for the recovery of *finer, penalties, and forfeitures* under the internal-revenue acts—the period being the same under either section, namely, five years.

DEPARTMENT OF JUSTICE,
August 3, 1872.

SIR : In answer to your inquiry as to the limitations upon proceedings, civil or criminal, under the internal-revenue laws, I have to say that—

By the 32d section of the crimes' act of April 30, 1790, (1 Stat., 119,) it is declared that no person shall be prosecuted, tried, or punished for any *offense, not capital*, nor for any *fine or forfeiture under any penal statute*, unless the indictment or information for the same shall be found or instituted within *two years* from the time of committing the offense or incurring the fine or forfeiture aforesaid, with a proviso that nothing therein contained shall extend to any person or persons fleeing from justice.

That provision, however, was subsequently restricted in its operation by the 89th section of the act of March 2, 1799, for

imitations under Internal-Revenue Laws.

the collection of duties on imports and tonnage, (1 Stat., 696,) which provided that "no action or prosecution shall be maintained in any case under this act unless the same shall have been commenced within *three years* next after the penalty or forfeiture was incurred;" the effect of the latter enactment being to except from the two years' limitation of the act of 1790 all prosecutions or suits for offenses, fines, forfeitures, or penalties under the duty-collection act of 1799, and to make such prosecutions or suits subject to a limitation of three years.

The 3d section of the act of March 26, 1804, (2 Stat., 290,) next declares "that any person or persons guilty of *any crime* arising under the *revenue-laws* of the United States, or incurring *any fine or forfeiture* by breaches of the *said laws*, may be prosecuted, tried, and punished, provided the indictment or information be found at any time within *five years* after committing the offense or incurring the forfeiture, any law or provision to the contrary notwithstanding."

This section, as it would seem, repealed by implication the three years' limitation contained in the act of 1799. Afterward, by the 4th section of the act of February 28, 1839, (5 Stat., 322,) it was enacted "that no suit or prosecution shall be maintained for *any penalty or forfeiture*, pecuniary or otherwise, accruing under the laws of the United States, unless the same suit or prosecution shall be commenced within *five years* from the time when the penalty or forfeiture accrued: *Provided*, The person of the offender, or the property liable for such penalty or forfeiture, shall, within the same period, be found within the United States, so that the proper process may be instituted and served against such person or property therefor."

Lastly, it appears that the 14th section of the act of March 3, 1863, (12 Stat., 741,) has repealed *so much* of the 89th section of the act of March 2, 1799, above cited, and *so much* of the 3d section of the act of March 26, 1804, also cited above, "as impose any limitation upon the commencement of any action or proceeding for the recovery of any *fine, penalty, or forfeiture*, incurred by reason of the violation of any law of the United States relating to the *importation or entry of goods, wares, or merchandise*."

Limitations under Internal-Revenue Laws.

Here it will be observed that while the act of 1863 repeals specifically so much of the 3d section of the act of 1804 as imposes a limitation upon suits for the recovery of *finés, penalties, or forfeitures*, under the *impost* laws, it leaves in full force the 4th section of the act of February 28, 1839, cited above, which *provides* a limitation applicable to such suits, and likewise so much of the 3d section of the act of 1804 as prescribes a limitation for the *prosecution of crimes* arising under the *revenue-laws*.

Now there can be no doubt that the provisions of the 3d section of the act of 1804 extend to prosecutions and suits under the *internal-revenue laws*, as well as to those under the customs or *impost-laws*, and it would seem that the repealing act of 1863, so far as it applies to that section, operates only upon the limitation concerning the proceedings for the recovery of fines, penalties, and forfeitures incurred under the latter laws, and not upon the limitation as it respects similar proceedings under the former laws.

But be that as it may, it is very clear that the provisions of the act of 1839 are sufficiently comprehensive to embrace all such proceedings, whether under the *impost* or the *internal-revenue laws*. Accordingly, in regard to the commencement of prosecutions and suits under the *internal-revenue acts*, the following statutes appear to furnish the law of limitation :

1. The 3d section of the act of 1804, as to all *criminal proceedings*, the limitation being five years.

2. The same section, perhaps, or if not, then certainly the 4th section of the act of 1839, as to all proceedings for the recovery of *finés, penalties, and forfeitures*, the limitation being the same under either section, namely, five years.

In connection with this subject the following cases may be appropriately mentioned: *United States vs. Maillard*, (13 Int. Rev. Rec., 27;) *In the matter of Adolf Landsberg*, (11 *ibid.*, 150;) *United States vs. Wright*, (11 *ibid.*, 35;) *United States vs. Shory*, (9 *ibid.*, 202.)

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,
Secretary of War.

Steamers General Meigs and General Burnside.

STEAMERS GENERAL MEIGS AND GENERAL BURNSIDE.

By charter-parties made in October, 1862, the steamers General Meigs and General Burnside were hired to the Government, to be used in the military service for the term of six months, commencing from the 15th of that month, at a per diem of \$300 for each, with the privilege of purchase at a stated amount at the end of three months. On the 2d of February, 1863, the Quartermaster-General issued an order to purchase the steamers under the provisions in their charter-parties, the purchase to date as of the 15th of January previous; that order was not finally carried into effect until the 13th of May following, on which day bills of sale, transferring the steamers to the United States, antedated the 15th of January, 1863, were executed and delivered by the owners thereof, who also made out bills for the purchase-money, bearing the date last mentioned, and received payment of the same; the owners furthermore made out bills against the Government for re-imbursement of expenses incurred in running the steamers during the period between the 15th of January and the 13th of May, and received payment thereof. A claim, however, was subsequently presented by them for compensation for the use of the steamers during that period, at the charter-rate of \$300 per diem, deducting the amount already received for re-imbursement of running expenses: *Held* that this claim, under the circumstances, has no validity.

DEPARTMENT OF JUSTICE,

August 7, 1872.

SIR: I have the honor to acknowledge the receipt of your letter of the 11th ultimo, asking my opinion upon certain questions of law arising upon claims made upon the Government by the former owners of the steamers General Meigs and General Burnside, for the services of those vessels from the 15th day of January, 1863, until the 13th of the ensuing May, at the rate of \$300 per day for each vessel.

On the 20th day of October, 1862, the said steamers, by separate charter-parties, alike in terms, were chartered to the United States for the period of six months from the 15th day of that month. Compensation was provided for in said charter-parties as follows: The "sum of three hundred dollars per day for each and every day said steamer may be employed, and to furnish all fuel from the above date until the said steamer is returned * * * to the port of Philadelphia, in the same order as when received."

Each charter-party contained the following clause: "The

Steamers General Meigs and General Burnside.

War Department has the privilege to purchase said steamer at the end of three months for the sum of forty-five thousand dollars, cash."

On the 2d of February, 1863, Quartermaster-General Meigs, in a letter to Deputy Quartermaster-General Crossman, among others, gave him the following instructions: "You are accordingly directed to purchase said vessels, as provided in the charter-parties, the purchase to date from the 15th of January, 1863. As the vessels are still in service, and payments for the services under those charters will not be made beyond that date, the owners will be paid the expenses of running them from said 15th day of January until such time as the expenses are assumed and provided for by the United States."

To have these instructions carried out, this letter was referred by Colonel Crossman to Assistant-Quartermaster Boyd.

R. F. Loper is described in the charter-party of the General Meigs as owner, and as managing owner in the charter-party of the General Burnside. Boyd states in respect to said letter as follows: "That immediately after he received said letter of February 2, 1863, he notified R. F. Loper verbally to make transfer of the titles of the boats to the United States Government, and said Loper thereupon verbally consented and promised so to do; that he did not show to said Loper said letter of February 2, 1863, or read the same to him, or state to him its contents, but notified him that he had instructions to purchase said steamers, and to pay therefor the sum of forty-five thousand dollars each, under and in pursuance of the provision in the charter-parties giving the War Department the privilege of purchasing them at and for the said sum of forty-five thousand dollars each."

On the 4th of February, 1863, R. F. Loper addressed to Quartermaster Biggs a letter, of which the following is a copy:

"PHILADELPHIA, *February 4, 1863.*

"DEAR SIR: I would hereby respectfully inform you that I have sold the steam-propellers General Meigs and General Burnside to the United States War Department, to date from the fifteenth day of January last past; that the United States War Department pay all expenses from and after that date.

"It was also agreed that the captains should have one

Steamers General Meigs and General Burnside.

thousand dollars per month to man the boats and victual all hands. The United States War Department to pay engineers, firemen, and coal-passers' wages; captain to furnish board.

Very truly, yours, &c.,

"R. F. LOPER.

"Lieut. Col. HERMAN BIGGS,

"Quartermaster, United States Army."

This letter shows that Boyd's statement, as above quoted, cannot be true; for it appears that Loper fully understood and made the contract of sale in accordance with the instruction of General Meigs. Boyd further states that, on the 9th of March, 1863, he addressed to said R. F. Loper a letter, bearing date March 9, 1863, requesting him to have the transfer made at once; and thereupon said Loper called at his office and stated verbally that he (Loper) declined to make the transfer, of which he (Boyd) at once informed the Quartermaster-General by letter, dated March 10, 1863; that immediately thereafter he received the letter of March 9, 1863, addressed by the Quartermaster-General to Colonel G. H. Crossman, and he then informed said R. F. Loper that he had received instructions not to purchase said steamers until further orders.

On the 9th of May the Quartermaster-General sent to Colonel Crossman instructions, which were referred to Assistant-Quartermaster Boyd, as follows:

"You will please take immediate measures to carry out the instructions embraced in the letter to you from this Office, dated February 2, 1863, a copy of which is inclosed, relative to the purchase of the steamers General Meigs and General Burnside; payment for the service of these vessels to cease from 15th January, 1863. Expenses of running them from that date to be paid to owners."

On the 13th of May, R. F. Loper, as owner of the steamer General Meigs, executed a bill of sale therefor to the United States, dated the 15th of January, 1863. On the same day, R. F. Loper, as one-fourth owner; Anthony Reybold, as one-fourth owner; and the firm of Harlan, Hollingsworth & Co., as one-fourth owner of the General Burnside, executed a

Steamers General Meigs and General Burnside.

bill of sale therefor to the United States, and the bill of sale by Wilcox, the owner of the other one-fourth, was dated on the 29th of April, 1863. Possession of the vessels was delivered to the United States on the said 13th day of May. Loper received the purchase-money for both vessels, and executed receipts, as follows :

" The United States to R. F. Loper, Dr.

<p>"Date of purchase: 1863, January 15.</p>	<p>The steamer named the General Meigs, with her masts, yards, sails, rigging, anchors, cables, boats, tackle, apparel, and appurtenances, complete</p>	<p>\$45,000 00</p>
---	---	--------------------

as per letters addressed Quartermaster-General's Office, Washington, February 2, and May 9, 1863, hereto annexed.

" Received, at Philadelphia, the 13th of May, 1863, of Captain A. Boyd, assistant quartermaster, United States Army, forty-five thousand dollars and cents, in full of the above account.

" R. F. LOPER."

The same receipt, in form, was executed in the case of the General Burnside.

In May and June, 1863, Loper received from the United States \$8,000 for the running-expenses of said vessels from the 15th of January to the 13th of May, 1863, and executed receipts, as follows :

" The United States to R. F. Loper, Dr.

<p>"1863, March 15.</p>	<p>Re-imbursements of moneys paid for victualing, manning, and sailing steam-propeller General Burnside, from the 15th day of January to the 15th day of March, 1863, as per agreement made with Brigadier-General M. C. Meigs, Quartermaster-General United States Army, 2 months, at \$1,000 per month.</p>	<p>82,000 00</p>
-------------------------	---	------------------

Steamers General Meigs and General Burnside.

"Received, at Philadelphia, the 30th of May, 1863, of Captain A. Boyd, assistant quartermaster, United States Army, the sum of two thousand dollars and . cents, in full of the above account.

" R. F. LOPER."

The other receipts are like this in form.

I do not consider it necessary to notice in detail the inquiries contained in the Comptroller's statement submitted by you, for they amount to the question, whether or not the United States are bound to pay Loper, and those whom he represents, for the services of said vessels from the 15th of January to the 13th of May, 1863, at the rate of \$300 each per day, deducting of course the amount already re-imbursed for their running-expenses.

It will not be denied that parties to a sale of a vessel may agree that it shall take effect at a date anterior to the actual transfer of title and possession, so far as the earnings or expenses of the vessel are concerned. Loper's receipts for the purchase-money of the vessels show that they were sold by him, "as per letters dated Quartermaster-General's Office, Washington, February 2 and May 9, 1863, hereto annexed," which letters were clearly and expressly to the effect that the sale was to date from the 15th of January, 1863; that the owners were not to be paid for the services of such vessels after that date, but were only to receive from the Government their running-expenses. These receipts, too, expressly state upon their face that the date of the purchase was the 15th of January, 1863. The bills of sale, with the exception of the one executed by Wilcox for one-fourth of the General Burnside, are dated on the 15th of January, 1863. Loper's receipts for the running-expenses of the vessels show upon their face that the money was received "as per agreement made with Brigadier-General M. C. Meigs, Quartermaster-General United States Army." The agreement here referred to is the one mentioned in Loper's letter to Biggs, of date February 4, 1863, in which it is stated that the sale is "to date from the 15th day of January last past; that the United States War Department pay all expenses from and after that date."

Putting these writings together, which are the best, and

Steamers General Meigs and General Burnside.

ordinarily ought to be treated as incontrovertible, evidence of the contract, and it is difficult to resist the conclusion that it was well and distinctly understood between the parties at the time the sales were made that the vendors were not to be paid for the services of the vessels after the 15th of January, but were to be paid the running-expenses; and with respect to those matters, the vessels were to be regarded as having become the property of the United States at the said date.

To weaken the force of these documents, the affidavit of Boyd is introduced, in which he says that he did not disclose the contents of said letters of February 2 and May 9 to Loper at the time of the purchase; that Loper complained and said he should insist upon payment for services of the vessels, &c.

Little weight, in my opinion, ought to be attached to this affidavit, for two reasons. First, Boyd knew that he had no authority to purchase the vessels otherwise than as instructed in said letters, and his failure to disclose their contents at the time of the purchase, if such was the fact, was either because he knew that Loper was aware of what they contained, or because for some reason he desired a misapprehension to exist as to the terms and conditions of the purchase. Second, the receipts show upon their face that the said letters were annexed, and they are found upon the files of the Department, annexed to the receipts. But whether annexed or not at the time of the purchase, Loper's letter to Biggs of February 4 shows that he well knew what the Quartermaster-General's letter of February 2 contained.

It is claimed that Wilcox is entitled to his proportionate pay for the services of the General Burnside, to the 29th of April, the date of his bill of sale; but I find among the papers a power of attorney from Wilcox to Loper, dated the 11th day of May, 1863, by which Loper is not only authorized to collect and receive the purchase-money for one-fourth of the General Burnside, but is also authorized to collect what may be due Wilcox for "sailing, victualing, and manning the said steamship." This satisfies me that Wilcox understood the arrangement as the other parties to the sale did. I think they are all chargeable with the knowledge,

Louisville and Portland Canal.

and bound by the acts of Loper in respect to the earnings and expenses of the vessels.

It has been argued that said owners had no motive and did not intend to give up the claim for services when they sold the vessels. What were the writings made for at that time if they were not to be the evidence of the intentions and acts of the parties? My opinion is, that they are the only evidence that can legally be considered in this case, and that they show that the former owners and vendors of the vessels have no claims against the United States for their services after the 15th day of January, 1863.

Very respectfully,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,

Secretary of War.

LOUISVILLE AND PORTLAND CANAL.

The expenditure of the appropriation provided by the act of June 10, 1872 chap. 416, "for continuing the work on the canal at the Falls of the Ohio River," whether made with or without the consent of the Louisville and Portland Canal Company, will not affect any rights which the latter may now have as to tolls.

DEPARTMENT OF JUSTICE,

August 7, 1872.

SIR: I have the honor to acknowledge the receipt of your letter of the 5th instant, inclosing a copy of an act approved June 10, 1872, making appropriations for the repair, preservation, and completion of certain public works on rivers and harbors, and calling my attention to the following provision therein:

"For the continuing the work on the canal at the Falls of the Ohio River, three hundred thousand dollars. And the Secretary of War is hereby directed to report to Congress at its next session, or sooner if practicable, the condition of said canal, and the provisions necessary to relieve the same from incumbrance, with a view to such legislation as will render the same free to commerce at the earliest practicable period, subject only to such tolls as may be necessary for the super-

Bridges across the Mississippi River.

intendence and repairs thereof, which shall not after the passage of this act exceed five cents per ton."

You inquire "whether the act above stated necessitates the Lonisville and Portland Canal Company to accept the rate of toll prescribed by it, should they consent to the improvement being carried on."

Confining myself to the question submitted by you, I have to say, in answer, that in my judgment the expenditure of the appropriation to continue the work on the canal at the Falls of the Ohio will make no difference with the rights of said company in respect to the tolls of said canal. The two clauses of the above-cited provision are separate and distinct, and the execution of the one is in no way connected with, or dependent upon, the execution of the other.

Whether said company have any right to refuse, or accept, or in any way interfere with the use of the appropriation, as indicated in said act of Congress, or whether they have any right to impose, at this time, tolls in excess of five cents per ton, are questions upon which I express no opinion. I only mean to say that the rights which the company now have as to tolls, whatever they may be, will continue unaffected by the use of said appropriation in continuing the work upon the canal, whether the expenditure is made with or without their consent.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,
Secretary of War.

BRIDGES ACROSS THE MISSISSIPPI RIVER.

The provision in the act of June 4, 1872, chap. 281, entitled "An act further regulating the construction of bridges across the Mississippi River," which requires the Secretary of War, in locating any such bridge, to "have due regard to the * * * wants of all railways and highways crossing said river," commented on and construed.

Where a bridge is to be located under an act wherein only railway use is mentioned and provided for, the wants of railways only are to be considered.

Bridges across the Mississippi River.

But it is otherwise where the bridge is to be located under an act providing for both railways and wagon-ways. There the wants of both kinds of road are to be regarded, and the location should be made with a view to the accommodation of each.

DEPARTMENT OF JUSTICE,*August 7, 1872.*

SIR: I have the honor to acknowledge the receipt of your letter of the 3d instant, in which you request my opinion upon the question whether, by the act of June 4, 1872, entitled "An act further regulating the construction of bridges across the Mississippi River," all such bridges as are therein referred to are required to be highway as well as railway bridges.

The act requires "that all bridges hereafter constructed over and across the Mississippi River, under any act of Congress, shall be subject to all the terms, restrictions, and requirements contained in the fifth section of an act entitled 'An act to authorize the construction of a bridge across the Mississippi River, at or near the town of Clinton, in the State of Iowa, and other bridges across said river, and to establish them as post-roads,' approved April 1, 1872;" and that, "in locating any such bridge, the Secretary of War shall have due regard to the security and convenience of navigation, to convenience of access, and to the wants of all railways and highways crossing said river."

It is, I presume, under the last clause of the act, which provides that due regard shall be had, in the location of these bridges, to the wants of railways and highways crossing the river, that the question to which you call my attention is raised.

Examining the copies of the several acts for the construction of bridges over the Mississippi and other navigable rivers, which accompany your letter, I find that in most of them provision is made for railway purposes and use only, while in a few of such acts provision is made for wagon-ways. It may properly be inferred, therefore, that when only use for railway purposes is provided for, use in connection with public highways is not included.

In view of this, there need be no difficulty in construing and applying the requirement of the act in relation to the regard

Bridges across the Mississippi River.

to be had, in locating the bridges, "to the wants of all railways and highways crossing the river." If a bridge is to be located under an act in which only railway use is mentioned and provided for, the wants of railways only are to be considered; but if under an act providing for both railways and wagon-ways, then the wants of both descriptions of roads must be regarded, and the location must be made with a view to the accommodation of both.

Under this interpretation of the clause referred to, the act is in harmony with all the acts for the construction of bridges over navigable rivers. Moreover, had Congress intended so important a modification of previous acts as a requirement that the bridges in question should all be constructed for both railways and highways, it is hardly to be supposed that it would have been content to make so vague a provision for the purpose as the words of this clause would constitute. It would, in fact, be leaving interests of very great value and consequence to the chances of a doubtful implication; and, as most of these bridges are authorized to be built by railway companies, interested only in the accommodation of their own business, it is not to be presumed, in the absence of explicit provision to that effect, that Congress meant to burden them with the heavy additional expense that would have to be incurred to accommodate these bridges to the uses of common highways or wagon-roads.

The true intent of the provision of the act relative to the location of bridges is, it seems clear, to define more particularly the duty of the Secretary of War in making such locations. In the 5th section of the act for the construction of the bridge across the Mississippi, at or near Clinton, &c., he is required to take care that it be located so as not to interfere with the security of navigation; but here he is required to have regard also to convenience of access, and to the accommodation of the railways and highways for the uses of which the bridges are intended.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,
Secretary of War.

Pensions.

PENSIONS.

The third *proviso* of the act of April 20, 1844, chap. 15, declaring that "no person in the Army, Navy, or Marine Corps shall be allowed to draw both a pension as an invalid and the pay of his rank or station in the service, unless the alleged disability for which the pension was granted be such as to have occasioned his employment in a lower grade, or in some civil branch of the service," is not repealed by the 5th and 13th sections of the act of July 14, 1862, chap. 166.

DEPARTMENT OF JUSTICE,

August 8, 1872.

SIR: I have the honor to acknowledge the receipt of your letter of the 22d ultimo, in which you submit for my opinion the following question: "Whether the language of the 5th and 13th sections of the act of July 14, 1862, (12 Stat., 568, 569,) should be construed as a repeal of the third proviso of the act of April 30, 1844," (5 Stat., 657.)

The proviso of the act of 1844, to which you refer, declares: "That no person in the Army, Navy, or Marine Corps shall be allowed to draw both a pension as an invalid and the pay of his rank or station in the service, unless the alleged disability for which the pension was granted be such as to have occasioned his employment in a lower grade, or in some civil branch of the service."

The 5th section of the act of 1862 provides "That pensions which may be granted in pursuance of the provisions of this act, to persons who may have been or shall be employed in the military or naval service of the United States, shall commence on the day of the discharge of such person, in all cases in which the application for such *provisions* [pensions] is filed within one year after the date of said discharge; and in cases in which the application is not filed during said year, pensions granted to persons employed as aforesaid shall commence on the day of the filing of the application."

The 13th section of the act of 1862 merely repeals all acts and parts of acts inconsistent with the provisions of that act.

I perceive nothing in the provisions of the acts of 1844 and 1862, above quoted, which makes them inconsistent with each other.

Survey of Land-Claims in Missouri.

The object of the proviso in the act of 1844 was to prohibit the payment to any one serving in the Army, Navy, or Marine Corps of *both* pay and pension, except when the disability for which the pension is allowed is such as to have occasioned his employment in a lower grade, or in some civil branch of the service. The 5th section of the act of 1862 was designed to regulate the commencement of pensions granted under that act. The former enactment operates only when a case arises which does not fall within either of the exceptions named; and its effect in such case, as it would seem, is not to avoid the pension altogether, but to prevent the pensioner from receiving it for and during the time he remains in the Army, Navy, or Marine Corps, and receives the pay of his station in the service. The latter enactment being directed to an entirely distinct subject-matter, namely, the period at which a pension granted shall commence, does not necessarily interfere with or restrain the operation of the other in the cases to which it properly applies.

I am, therefore, of the opinion that the sections of the act of 1862 mentioned, should not be construed as repealing the proviso in the act of 1844.

I have the honor to be, very respectfully,

GEO. H. WILLIAMS.

Hon. C. DELANO,

Secretary of the Interior.

SURVEY OF LAND-CLAIMS IN MISSOURI.

In the matter of the claim for a tract of land near Saint Louis, Missouri, confirmed to Angelica Chouvin, assignee of Jean F. Perry, in 1811, the facts presented showing that two surveys of the claim have been made, but that both of them have been rejected by former heads of the Land Department: *Held* that it is competent to the present head of that Department to order a new survey.

The 7th section of the act of March 3, 1807, chap. 36, entitles the claimant to a survey that will determine the location and boundaries of the land, and enable him to obtain the patent provided for by the 6th section of the same act.

DEPARTMENT OF JUSTICE,

August 9, 1872.

SIR: I have the the honor to acknowledge the receipt of your letter of the 22d ultimo, asking my opinion as to whether

Survey of Land-Claims in Missouri.

or not you have the legal power to order a new survey upon the following statement of facts which you submit :

"August 20, 1811, the proper board of commissioners confirmed to Angelica Chouvin, assignee of Jean F. Perry, the following-described premises near Saint Louis, Missouri, to wit: Forty arpents front of land upon forty in depth, along the river Des Peres, from the north to the south, which is bounded on one side by the lands of Louis Robert, and on the other by the domain of the King.

"In 1832 a survey was made and located upon land west of Robert, which had been theretofore surveyed in satisfaction of a claim confirmed to Maria Louisa Chouvin Papin, and patented to her.

"January 27, 1836, the Commissioner of the General Land-Office declined to approve of this survey and issue a patent upon the same, unless upon proof that the prior patent to Papin had been set aside by proceedings in court.

"In 1853, Chouvin made application to the surveyor-general of Missouri for a new survey, to be located on the east of Robert, which application was declined by the surveyor-general on the ground that his power in the premises had ceased. This decision was approved by the Commissioner of the General Land-Office, and afterward, October 6, 1853, by Secretary McClelland, on appeal.

"March 18, 1865, Secretary Usher granted an application for a new survey, relying, as his authority therefor, upon the act of June 2, 1862, (12 Stat., 410,) and the case of *McGuire vs. Tyler*, (1 Black, 195.)

"Under this order a new survey was made by Wm. H. Cozzens, on the east of Robert, which Secretary Usher, on the 11th of May, 1865, rejected for the reason that it did not include the land described in the grant.

"May, 13, 1865, Secretary Usher revoked his rejection and left the question of approval or rejection open, to be acted upon by his successor.

"June 28, 1865, Secretary Harlan acted upon the question, and rejected the Cozzens survey.

"January 5, 1870, Secretary Cox refused to re-open the case, and held that he was concluded by the action of Secretary Harlan.

Internal-Revenue Tax on State Banks.

"July 17, 1872, I overruled a motion to approve of the Cozens survey and issue a patent for the land therein described, on the ground that the matter was *res adjudicata*.

"July 19, 1872, claimant made an application for an order for a new survey, which is now pending."

Section 7 of the act of March, 3, 1807, (2 Stat., 440,) under which the confirmation was made in the case, provides for and entitles the claimant to a survey that will determine the location and boundaries of his land. Effect can only be given to the act by holding that this survey must be one which enables the claimant to obtain the patent for which provision is made by the 6th section of the act. The approval of a survey must necessarily be made by the Commissioner of the General Land-Office, or the Secretary of the Interior, as the case may be, before patent in conformity therewith can be issued. Two surveys of the land in question have been made, both of which have been disapproved, and if the power of the Land Department of the Government is thereby exhausted there would seem to be no way in which the claimant could obtain his patent.

My opinion is that you have the power to order a new survey, and I respectfully refer to my opinion in the case of rancho Rio de Santa Clara, Valentine Cota et al., confirmees, of date the 2d instant, (see *ante*, p. 74,) as applicable to this question.

Very respectfully, &c.,

GEO. H. WILLIAMS.

Hon. C. DELANO,

Secretary of the Interior.

INTERNAL-REVENUE TAX ON STATE BANKS.

The provisions of the 6th section of the act of March 3, 1865, chap. 78, imposing on national banking associations, State banks, or State banking associations, a tax of ten per centum upon the amount of notes of any person, State bank, or State banking association, used for circulation and paid out by them, apply as well to the notes of a State bank or banking association which are by itself paid out, as to any others falling within the above description.

Internal-Revenue Tax on State Banks.

The exemption from taxation of five per centum of the outstanding circulation of any bank, association, corporation, company, or person, provided by the 14th section of the said act of March 3, 1865, as amended by section 9 [*bis*] of the act of July 13, 1866, chap. 184, does not relate to the *tax upon notes paid out* which the 6th section of the act of 1865 imposes, but exclusively to the *tax upon circulation* imposed by the 110th section of the act of June 30, 1864, chap. 173, as amended by section 9 of the said act of 1866; and it relieves, to the extent mentioned, from the latter tax only.

DEPARTMENT OF JUSTICE,
August 14, 1872.

SIR: I have the honor to acknowledge the receipt of your letter of the 8th instant, in which you submit for my official opinions the following questions:

"Can a State bank pay out *its own notes* without paying the tax of ten per cent. imposed by section 6, act of March 3, 1865?"

"Can it pay *its own notes* to the extent of five per cent. of its capital without paying any tax whatever under section 14 of the act of March 3, 1865, as amended by the act of July 13, 1866, section 9, (14 Stat., 146.)"

"Or, in other words, is the act of March 3, 1865, section 6, to be construed as taxing banks ten per cent. only for notes other than its own paid out after July 1, 1866, and so permitting banks still to issue circulating-notes the same as national banks, and without any taxation whatever, to the extent of five per cent. of its capital?"

Section 6 of the act of March 3, 1865, upon which your first question arises, reads as follows:

"*And be it further enacted*, That every national banking association, State bank, or State banking association, shall pay a tax of ten per centum on the amount of notes of any person, State bank, or State banking association, used for circulation and paid out by them after the first day of August, eighteen hundred and sixty-six, and such tax shall be assessed and paid in such manner as shall be prescribed by the Commissioner of Internal Revenue."

Whether we look at the language of this section, or the obvious intent with which it was passed, a negative answer to your inquiry about it must be given. When a State bank pays out the "notes of any person, State bank, or State bank-

Internal-Revenue Tax on State Banks.

ing association," a tax of ten per cent. is to be assessed upon the amount. This language is sufficiently comprehensive to embrace the notes issued by the bank paying them out. "Any" in this connection should be regarded, I think, as co-extensive in signification with "all." Had Congress contemplated the important exception suggested, some language, it seems to me, would have been employed to that effect. To sustain the exception by construction would be to force the words of the act from their natural import. Certainly a State bank pays out the notes of a State bank when it pays out its own notes.

Manifestly the object of this section was, by severe taxation, to put an end to the existence of State banks, or rather, perhaps, to compel them to organize under the national-bank act. To hold that a State bank could pay out its own notes without taxation, would be, as it appears to me, inconsistent with the end proposed by this legislation. The ultimate design of Congress was to make national-bank notes instead of State bank notes the currency of the country. *Veazie Bank vs. Fenno*, 8 Wall., 533, was a case where a tax of ten per cent., under said section 6, was assessed upon the notes of a State bank issued by it for circulation. Objection was made to the constitutionality of the tax in that case. No question, however, was made, but, on the contrary, it was assumed that the bank's own notes paid out for circulation were subject to the tax.

Section 14, upon which your other questions arise, is as follows:

"And be it further enacted, That the capital of any State bank or banking association, which has ceased or shall cease to exist, or which has been converted into a national bank, shall be assumed to be the capital as it existed immediately before such bank ceased to exist, or was converted as aforesaid; and whenever the outstanding circulation of any bank, association, corporation, company, or person shall be reduced to an amount not exceeding five per centum of the chartered or declared capital existing at the time the same was issued, said circulation shall be free from taxation; and whenever any bank which has ceased to issue notes for circulation shall deposit in the Treasury of the United States in lawful money,

Internal Revenue Tax on State Banks.

the amount of its outstanding circulation, to be redeemed at par, under such regulations as the Secretary of the Treasury shall prescribe, it shall be exempt from any tax upon such circulation; and whenever any State bank or banking association has been converted into a national banking association, and such national banking association has assumed the liabilities of such State bank or banking association, including the redemption of its bills by any agreement or understanding whatever with the representatives of such State bank or banking association, such national banking association shall be held to make the required return and payment on the circulation outstanding, so long as such circulation shall exceed five per centum of the capital before such conversion of such State bank or banking association.

This section evidently refers to the tax on "outstanding circulation," and not to the tax upon "paying out" notes. Section 110 (14 Stat., 136) provides for a tax of one-twelfth of one per centum each month upon circulation, and when said section 14 declares that whenever the outstanding circulation of any bank "shall be reduced to an amount not exceeding five per centum of the chartered or declared capital existing at the time the same was issued, said circulation shall be free from taxation," it is quite obvious that the exemption applies to the tax imposed by said section 110. Section 14 proceeds upon the assumption that State banks will cease to exist or be converted into national banks, and the last five per cent. of their circulation is relieved from any tax, on the ground (as it is presumed) that, by the destruction of their notes or otherwise, that amount of circulation cannot be withdrawn and taken up by such banks.

I do not see any necessary conflict between sections 14 and 6, above cited, and therefore conclude that all the notes of any person, State bank, or State banking association, used for circulation, paid out by a State bank, are subject to a tax of ten per centum, and that the exemption provided for in section 14 does not apply to the paying out of notes, but is applicable exclusively to circulation.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS,

Hon. WM. A. RICHARDSON,

Acting Secretary of the Treasury.

Claim of William T. Shirley.

CLAIM OF WILLIAM T. SHIRLEY.

William T. Shirley, while a clerk in the War Department, performed extra services in the years 1865 and 1866, for which he now presents a claim for compensation out of an appropriation made by the act of May 18, 1872, chap. 172, "to enable the Secretary of War to pay for additional clerical services" theretofore employed by him, &c.: *Advised* that payment of the claim is prohibited by the act of August 26, 1842, chap. 202.

DEPARTMENT OF JUSTICE,

August 14, 1872.

Sir: I have the honor to acknowledge the receipt of your letter of the 5th instant, requesting my opinion whether, under a certain clause in the appropriation act of May 18, 1872, you can legally compensate Mr. William T. Shirley for services which, in addition to those appropriate to his duty, he rendered to the Government during a period extending from September 12, 1865, to July 12, 1866; Mr. Shirley being at the time of rendering such service a clerk in the War Department, and the clause referred to being as follows: "To enable the Secretary of War to pay for additional clerical services heretofore employed by him in the investigation and settlement of accounts for abandoned and captured property, \$1,000."

Various acts have been passed by Congress touching the subject of extra compensation to officers of the Government whose salaries are fixed by law, and several decisions have been made by the Supreme Court and by my predecessors in office upon the same subject; but it is only necessary upon this inquiry to consider section 12 of the act of August 26, 1842, (5 Stat., 525,) which reads as follows: "No allowance or compensation shall be made to any clerk or other officer by reason of the discharge of duties which belong to any other clerk or officer in the same or any other Department, and no allowance or compensation shall be made for any extra services whatever which any clerk or other officer may be required to perform."

Clearly the claim of Mr. Shirley is within the prohibition of this section. He was a clerk in the War Department at

 Claim of William T. Shirley.

the time the extra services were rendered for which he claims compensation. Necessarily, therefore, this section must be repealed as to his claim by the clause of the appropriation act of 1872, above cited, or it cannot be paid. No express words for that purpose are used, and the repeal, if any, must be by implication. To create a repeal by implication there must be a positive repugnancy between the old and the new law, so that they cannot stand together. (*Wood vs. The United States*, 16 Peters, 342; *Cool vs. Smith*, 1 Black, 459.)

* The clause relied on by Mr. Shirley enables the Secretary of War "to pay for additional clerical services heretofore employed." "Additional clerical services" here may as well mean the employment of persons not clerks to perform such services as the employment of those who are clerks for that purpose.

Looking at the legislation alone, the presumption would be that, after having expressly prohibited payment to clerks for extra services, Congress did not intend to modify the prohibition for the benefit of a single claim. Both acts can operate together, which proves that one does not repeal the other. Papers have been filed with me to show that it was the intent of Congress, in the clause referred to, to provide for the payment of this claim, but no such intent is expressed in the act; and the question is not, what was intended, but what is the law, as made by Congress, upon the subject.

According to all recognized rules for the construction of statutes, the clause cited from the appropriation act of 1872 does not repeal the 12th section of the act of August 26, 1842, and Mr. Shirley's claim must be held to be within its prohibition. Authority upon this subject may be found as follows: 10 Opin., 436, 442, and 444; 21 How., 464; 8 Wall., 33.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. Wm. W. BELKNAP,

Secretary of War.

Claim of Gideon J. Pillow.

CLAIM OF GIDEON J. PILLOW.

Gideon J. Pillow, of Tennessee, having been pardoned by the President for his participation in the rebellion, filed in the War Department a claim against the Government for mules alleged to have been taken from his plantation in Arkansas, in the year 1862, by the military forces of the United States: *Advised* that the allowance of the claim by the War Department is prohibited by the act of February 21, 1867, chap. 57.

DEPARTMENT OF JUSTICE,

August 14, 1872.

SIR: I have the honor to acknowledge the receipt of your letter of the 11th instant, with papers relating to the claim of Gideon J. Pillow, of Tennessee, for mules alleged to have been taken from his plantation in Arkansas, in the year 1862, by the military forces of the United States; and you submit for my official opinion the question whether or not the Secretary of War has any authority to pay Mr. Pillow this claim, he having been pardoned by the President.

On the 21st of February, 1867, Congress passed the following act, which remains in full force and effect:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of chapter two hundred and forty of the acts of the Thirty-eighth Congress, first session, approved July fourth, eighteen hundred and sixty-four, shall not be construed to authorize the settlement of any claim for supplies or stores taken or furnished for the use of or used by the armies of the United States, nor for the occupation of or injury to real estate, nor for the consumption, appropriation, or destruction of or damage to personal property by the military authorities or troops of the United States, where such claim originated during the war for the suppression of the Southern rebellion in a State or part of a State declared in insurrection by the proclamation of the President of the United States, dated July first, eighteen hundred and sixty-two, or in a State which by an ordinance of secession attempted to withdraw from the United States Government: Provided, That nothing herein contained shall repeal or modify the effect of any act or joint resolution extending the

Appeal from Decisions of the Accounting-Officers.

provisions of the said act of July fourth, eighteen hundred and sixty-four, to the loyal citizens of the State of Tennessee or of the State of West Virginia or any county therein."

Mr. Pillow's claim originated during the war for the suppression of the Southern rebellion "in a State which by an ordinance of secession attempted to withdraw from the United States Government," and it is for personal property appropriated by the military authorities of the United States; and therefore, whatever merits the claim may have, it is clear the War Department has no jurisdiction to settle it and direct its payment.

That Congress has not determined to pay persons who were in the rebellion for property taken by the troops of the United States during the war, is evidenced by section 2 of the act of March 3, 1871, (16 Stat., 524,) providing for a "commission to settle the claims of loyal citizens," &c.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,

Secretary of War.

APPEAL FROM DECISIONS OF THE ACCOUNTING-OFFICERS.

The provision of the 4th section of the act of August 16, 1856, chap. 124, declaring that, as to the accounts of marshals, district attorneys, &c., "an appeal shall lie from the decision of the accounting-officers to the Secretary of the Interior," was impliedly repealed by the act of March 30, 1868, chap. 36.

Prior to the act of 1856 there was no law authorizing an appeal in such cases to the Secretary of the Interior, and none was enacted subsequent to the act of 1868 down to the act of June 22, 1870, chap. 150, by which only such powers as were then exercised by the Secretary of the Interior over the accounts aforesaid were thereafter to be exercised by the Attorney-General.

No statute has been passed since the last-mentioned act, giving an appeal from the accounting-officers to the Attorney-General in the cases referred to; and hence, under the existing law, such an appeal does not lie.

DEPARTMENT OF JUSTICE.

August 19, 1872.

SIR: William A. Merriwether has filed certain papers in this Department by way of appeal from the decision of the

Appeal from Decisions of the Accounting-Officers.

First Comptroller of the Treasury disallowing several items in his account as marshal of the United States for the district of Kentucky, and certifying a balance due him of \$1,918.96; and the question arises, *in limine*, as to his right to appeal in this case to the Attorney-General.

Section 8 of the act of March 3, 1817, (3 Stat., 366,) provides, "That it shall be the duty of the First Comptroller to examine all accounts settled by the First and Fifth Auditors, and certify the balance arising thereon to the Register;" and the 4th section of the same act makes it the duty of the First Auditor "to certify the balance, and transmit the accounts with the vouchers and certificate to the First Comptroller for his decision thereon."

Controversy arose as to the construction of these sections. On behalf of the heads of Departments it was claimed that they have power to revise the action of the accounting-officers of the Treasury, as to accounts arising in their respective Departments; and on the other hand it was claimed that such action was binding upon all the other executive officers of the Government. To put an end to this dispute, Congress on the 30th of March, 1868, (15 Stat., 54,) passed the following act:

"*Be it enacted, &c.*, That the act of March three, eighteen hundred and seventeen, entitled 'An act to provide for the prompt settlement of public accounts,' shall not be construed to authorize the heads of Departments to change or modify the balances that may be certified to them by the Commissioner of Customs or the Comptroller of the Treasury, but that such balances, when stated by the Auditor and properly certified by the Comptroller, as provided by that act, shall be taken and considered as final and conclusive upon the executive branch of the Government, and be subject to revision only by Congress or the proper courts: *Provided*, That the head of the proper Department, before signing a warrant for any balance certified to him by a Comptroller, may submit to such Comptroller any facts in his judgment affecting the correctness of such balance, but the decision of the Comptroller thereon shall be final and conclusive, as hereinbefore provided."

Merriwether's account as marshal was stated by the Auditor, and properly certified by the First Comptroller, as pro-

Appeal from Decisions of the Accounting-Officers.

vided by said act of 1817, and therefore must be taken and considered as final and conclusive upon the Attorney-General, as a part of the executive branch of the Government, unless he is made an exception by some act of Congress.

Section 4 of the act of August 16, 1856, (11 Stat., 49,) provides that as to the accounts of marshals, district attorneys, and clerks, "an appeal shall lie from the decision of the accounting-officers to the Secretary of the Interior." Section 15 of the act of June 22, 1870, (16 Stat., 162,) creating the Department of Justice, is as follows: "That the supervisory powers now exercised by the Secretary of the Interior over the accounts of the district attorneys, marshals, clerks, and other officers of the courts of the United States, shall be exercised by the Attorney-General, who shall sign all requisitions for the advance or payment of moneys out of the Treasury, on estimates or accounts, subject to the same control now exercised on like estimates or accounts by the First Auditor or First Comptroller of the Treasury." And it is claimed that, by virtue of these two provisions of law, jurisdiction is vested in the Attorney-General to hear the appeal in this case.

Section 4 of the act of March 3, 1849, (9 Stat., 395,) creating a Home Department, provides: "That the supervisory power now exercised by the Secretary of the Treasury over the accounts of the marshals, clerks, and other officers of all the courts of the United States, shall be exercised by the Secretary of the Interior, who shall sign all requisitions for the advance or payment of money out of the Treasury, on estimates or accounts, subject to the same control now exercised on like estimates or accounts by the First Auditor and First Comptroller of the Treasury."

So that it will be seen that, with the change of official designation, the section of the act of 1870, above cited, is a substantial copy of section 4 of the act of 1849. Congress, no doubt, intended to confer the same power in both cases, which was exactly the power possessed by the Secretary of the Treasury prior to the act of 1849. Confessedly there never was any right of appeal from the accounting-officers to the Secretary of the Treasury as to the accounts of marshals and other officers of the courts, and therefore no right of appeal was allowed to the Secretary of the Interior by the said 4th

Postal Cards.

section of the act of 1849, and of course none to the Attorney-General by the said 15th section of the act of 1870. Congress must have understood that section 4 of the act of 1849, copied into the act of 1870, did not give the right of appeal; otherwise the 4th section of the act of 1856 would not have been passed.

I think that the 4th section of the act of 1856, giving the right of appeal to the Secretary of the Interior, was repealed by the said act of 1868; because the balances of accounts, as stated by the Auditor and certified to by the Comptroller, cannot be binding and conclusive upon the executive branch of the Government, as provided in the act of 1868, if the Attorney-General, who is a part of such executive branch, has jurisdiction to review and re-adjust those balances on appeal. Supervisory powers over the accounts of officers of the courts may be exercised without the right of appeal. All the emolument-accounts of these officers and all their expenditures, not provided for by law, are to be first examined and approved by the Attorney-General before they go to the accounting-officers of the Treasury.

My opinion is that the appeal does not lie in this case.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. WM. A. RICHARDSON,

Acting Secretary of the Treasury.

POSTAL CARDS.

The 170th section of the act of June 8, 1872, chap. 335, authorizing the Postmaster-General to furnish and issue to the public postal cards, does not empower him to enter into any contract for the future payment of money to persons supplying them, in the absence of any appropriation by Congress which is applicable to the subject.

DEPARTMENT OF JUSTICE,

August 23, 1872.

SIR: I have the honor to acknowledge the receipt of your communication of the 21st instant, in which you submit for my official opinion the following questions:

"1. Is the authorization and direction contained in the

Postal Cards.

170th section of the 'Postal Code,' to furnish and issue 'postal cards to the public, with postage-stamps impressed thereon,' sufficient to warrant the Postmaster-General in making a contract for the same before a specific appropriation by Congress has been made, without violating the 7th section of the act of July 12, 1870? (See 16 Stat., 251.)

"2. If the foregoing question is answered affirmatively, then can the postal cards be construed as coming within the provisions of the appropriations for adhesive stamps, stamped envelopes, and newspaper-wrappers, and be paid for out of those appropriations, or either of them, or out of any other existing appropriations."

Said section 170 is as follows: "That, to facilitate letter-correspondence and provide for the transmission of the mails, at a reduced rate of postage, of messages, orders, notices, and other short communications, either printed or written in pencil or ink, the Postmaster-General shall be, and he is hereby, authorized and directed to furnish and issue to the public, with postage-stamps impressed upon them, 'postal cards,' manufactured of good stiff paper, of such quality, form, and size as he shall deem best adapted for general use; which cards shall be used as a means of postal intercourse, under rules and regulations to be prescribed by the Postmaster-General, and when so used shall be transmitted through the mails at a postage charge of one cent each, including the cost of their manufacture."

And the following is a copy of section 7 of the act of July 12, 1870, referred to by you: "That it shall not be lawful for any Department of the Government to expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or to involve the Government in any contract for the future payment of money in excess of such appropriation."

On the 1st of June, 1872, Congress passed an act "making appropriations for the service of the Post-Office Department for the year ending June 30, 1873, in which all the appropriations are for specific purposes excepting one of \$1,500 for miscellaneous items. Subsequently, and on June 8, an act was passed "to revise, consolidate, and amend the statutes relating to the Post-Office Department," which contains said

Postal Cards.

section 170. No appropriation was therefore made for "postal cards," and it is hardly necessary to say that the Postmaster-General has no power to divert the appropriations specifically made for adhesive postage-stamps, stamped envelopes, and newspaper-wrappers, to the procurement of postal cards. Clearly they are not embraced in the letter of the law; and as they were not provided for at the time, it cannot be supposed that they entered into the intent of such appropriations.

Prior to 1870, acts of Congress were passed expressly or constructively imposing upon the Executive Departments of the Government duties involving the expenditure of money for which no appropriations were made, and from the existence of those duties it was inferred that the power to incur the necessary debts for their performance also existed. To cut off all such inferences and assumptions by the Departments was the evident purpose of said section 7 of the act of 1870. Arrangements by the Post-Office Department for the manufacture and furnishing of "postal cards" would necessitate the creation of a large indebtedness, and therefore would "involve the Government in a contract for the future payment of money in excess of the appropriations." Manifestly the Postmaster-General has no power to do this unless said section 7 is *pro tanto* repealed by said section 170. To create a repeal by implication, there must be a positive repugnancy between the provisions of the new law and those of the old, (*Wood vs. The United States*, 16 Peters, 342; *Daviess vs. Fairbairn*, 3 How., 636.) One statute is not to be construed as a repeal of another if it be possible to reconcile the two together, (*Harford vs. The United States*, 8 Cranch, 109; *Cool vs. Smith*, 1 Black, 459.) Explanations of section 170 may be made without holding that it is in conflict with any older law, the most probable of which is, that as the Post-Office appropriation bill was passed before provision was made for postal cards, the necessary appropriation therefor was inadvertently omitted. Possibly Congress may have intended that the Postmaster-General should obtain such information and make such arrangements as he could without the expenditure of money in reference to such cards before the next session of Congress, in view of which it would make the necessary appropriation.

Internal-Revenue Tax on Tobacco.

Be that as it may, Congress has fixed upon the very good policy of keeping the expenditure of the public money under its control, and it is not to be presumed that the intent to depart from that policy by conferring upon the Postmaster-General power to make contracts for thousands or millions of dollars at his discretion, would be left to a doubtful construction of the statutes. Persons entering into contracts at this time to furnish "postal cards" must look for compensation to the chances of future legislation. No provision can now be made by the Postmaster-General as to the time or mode of payment, and this would probably tend to increase the expense and place difficulties in the way of the new system.

Independently, however, of all questions of expediency, I am of the opinion that you have no power under existing laws to enter into a contract for the future payment of money to persons for furnishing the "postal cards" described in section 170 of the act of June 8, 1872.

Very respectfully,

GEO. H. WILLIAMS.

Hon. JNO. A. J. CRESWELL,
Postmaster-General.

INTERNAL-REVENUE TAX ON TOBACCO.

Effect of the amendment of the 74th section of the act of July 20, 1868, chap. 186, made by the 31st section of the act of June 6, 1872, chap. 315, in regard to the internal-revenue tax on tobacco, considered.

All tobacco stored in bonded warehouses, and withdrawn for sale or consumption before the 1st of July, 1872, is, notwithstanding that amendment, subject to taxes imposed by the act of July 20, 1868.

But all tobacco in bonded warehouses on the 1st of July, 1872, and withdrawn after that date for the same purposes, is by virtue of that amendment subject to the tax imposed by the act of June 6, 1872.

DEPARTMENT OF JUSTICE,

August 27, 1872.

SIR: I have the honor to acknowledge the receipt of your letter of the 19th instant, in which you submit for my official opinion the following question: "At what rates, in view of the amendment of June 6, 1872, should internal-revenue taxes

Internal-Revenue Tax on Tobacco.

be required upon tobacco which was stored in an export bonded warehouse on or since June 6th, 1872, when withdrawn for consumption or sale in this country?"

Section 31 of the act of June 6, 1872, provides that "*on and after* the 1st day of July next, the act entitled 'An act imposing taxes on distilled spirits and tobacco, and for other purposes,' approved July 20, 1868, be, and the same is hereby, amended as follows": Among other amendments to said act is this: "That section 74 be amended by striking out all after the enacting clause and inserting in lieu thereof the following, to wit: * * * All tobacco and snuff now stored in any export bonded warehouse shall, on and after July 1, 1872, be subject to the same tax as is provided by this act, and shall, within six months after the passage of this act, be withdrawn from such warehouse upon payment of the tax, or for export, under the regulations of the Commissioner of Internal Revenue now in force concerning withdrawals of tobacco and snuff from bonded warehouses. And any tobacco or snuff remaining in any export bonded warehouse for a period of more than six months after the passage of this act shall be forfeited to the United States, and shall be sold or disposed of for the benefit of the same in such manner as shall be prescribed by the Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury."

Taking section 31 as a whole, it is perfectly clear that Congress intended to impose upon all manufactured tobacco remaining in the manufactory or found stored in a bonded warehouse on the 1st of July, 1872, and withdrawn subsequent to that date for consumption or sale, a uniform tax of twenty cents per pound, unless the word "now," in that part of the section above cited, subjects the particular tobacco stored in a warehouse between June 6, the passage of the act, and the said 1st of July, and thereafter withdrawn for the purposes aforesaid, to a tax of thirty-two and sixteen cents per pound, according to the quality, as provided in the act of 1868. Any such discrimination, if made, ought to be founded upon good reasons and clearly appear.

Attention in considering this question is due to the peculiar phraseology of the enacting clauses of said section. This amendment is not made to take effect at once, but at some

Internal-Revenue Tax on Tobacco.

future date; and though perfected and approved by Congress on the 6th of June, is not in fact made until the 1st of July. Certain words of the act of 1868 are to be stricken out and in lieu thereof the words quoted above are to be inserted; but they are not to be inserted until the 1st of July. Can they have any force or are they any more than proposed amendments prior to that time? Can words that are to be inserted at some future day in a law, and at that time to become a part thereof, have any effect before the insertion is made? To hold that the amendment took effect on the 6th of June, by virtue of the word "now," is to hold that on that day it reduces the taxes on certain tobacco from thirty-two to twenty cents per pound, if withdrawn as directed, although by its own express provision it was not to be any part of the law until the 1st of July.

To hold that the word "now" relates to the time when the amendatory words are inserted in the old law, is not only reasonable in point of construction, but gives to the act a reasonable and just effect. I need not say that, like much of the phraseology of our internal-revenue laws, the language in question seems tautological and confused; but while it is more than probable that in the numerous amendments to the original draught of the bill the precise meaning or effect of the word "now" was overlooked, it is beyond doubt that Congress did not intend that there should be any change in the law until the 1st of July. To support this view reference may be made to other parts of the act in question, which is to take effect, as elsewhere declared, on the 1st of August, 1872, but some of its provisions are to go into operation upon the passage of the act; in which cases the word "now" is not used, but the words "prior to" or "after the passage of the act," to indicate that time.

Section 42 of the act is as follows: "That all internal taxes *now* assessed or liable to be assessed against but not collected from ship-builders as manufacturers, under section 4 of the act of March 31, 1868, entitled 'An act to exempt certain manufacturers from internal tax and for other purposes,' for sales of vessels, be, and the same are hereby, remitted, and no further assessments shall be made on account thereof." Can this section, in consequence of the use of the word "now,"

Internal-Revenue Tax on Tobacco.

be construed to mean that all taxes mentioned therein "assessed or liable to be assessed" on the 6th of June, when the act was passed, shall be remitted, and that such taxes "assessed or liable to be assessed" between that time and the 1st of August, when the act takes effect, shall be collected? or rather does it not mean that all such taxes "assessed or liable to be assessed" when the act takes effect shall be remitted?

Section 44, among other clauses, has the following: "That no right of action barred by any statute now in force shall be revived by anything herein contained." Is it not clear that a defendant in a suit under this act, desiring to avail himself of the statute of limitations, could, if necessary to perfect the bar, include the period between the passage of the act and the time it took effect?

One idea suggested to show that the word "now" means the 6th of June and not the 1st of July, is that Congress intended to abolish bonded warehouses, and was therefore unwilling to allow tobacco to be stored therein between said dates, to be withdrawn upon the payment of the new and lower tax. I do not see how this would facilitate the destruction of such warehouses, when the act expressly declares that they may continue and be used as therein provided for six months after its passage, at which time any tobacco found in them is to be forfeited to the Government.

Section 73 of the act of 1868 provides for the exportation of tobacco through bonded warehouses, but the amendment of 1870, which repeals that section and provides for exportation from the manufactory, clearly does not go into effect until the 1st of July; so that if the right to store tobacco in bonded warehouses ceased on the 6th of June by virtue of the said word "now," there would seem to be no way in which tobacco, without payment of the tax, could be exported from the United States between that date and the 1st of July. Assuming that the word "now" means the 6th of June, it thence follows that there is no way in which tobacco stored in a bonded warehouse between said date and the 1st of July can, after the latter date, be withdrawn for exportation without prepayment of the tax; for on the 1st of July the old law was repealed, and the right to withdraw tobacco after that date

Internal-Revenue Tax on Tobacco.

for exportation, with respect to the time when it was stored, is precisely the same as the right to withdraw tobacco for consumption or sale.

I do not see what difference it makes to the Government whether tobacco is taken from a bonded warehouse or from a manufactory after the 1st of July upon the payment of the new tax, unless possibly the payment may be a little longer delayed in the one than in the other case. On the 6th of June, it is said, there were large quantities of tobacco in transitu from the manufactory to the bonded warehouses, and it certainly seems inequitable that tobacco which reached the warehouse on the 5th of June, and was withdrawn after the 1st of July, should pay a tax of only twenty cents per pound, while the same kind of tobacco that reached the warehouse two days afterward, and was withdrawn at the same time, is compelled to pay a tax of thirty-two cents per pound.

Congress, with a view to the injustice that might be worked by a change in the law before it could be known to those whose interests were to be affected thereby, provided that section 31 should go into effect on the 1st of July and the residue of the act, with a few exceptions, on the 1st of August. Where it was evident no harm could result, the act in a few instances, and where it is so expressly provided, takes effect upon its passage. One of the evils of our legislation is the frequent changes in the revenue system of the country, and unless it clearly appears that the intent of Congress is otherwise, they ought to be construed so as to affect with equal justice all of those upon whom they are intended to operate.

My opinion is that all tobacco stored in bonded warehouses and withdrawn for sale or consumption before the 1st of July, 1872, is subject to the taxes prescribed by the act of July 20, 1868, and that all tobacco in bonded warehouses on the said 1st of July, withdrawn after that date for the same purposes, is subject to the tax prescribed by the act of June 6, 1872.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. WM. A. RICHARDSON,

Acting Secretary of the Treasury.

Mineral Lands.

MINERAL LANDS.

The terms "valuable mineral deposits," used in the act of May 10, 1872 chap. 152, to promote the development of the mining resources of the United States, include diamonds; and the title to public lands containing these minerals may, accordingly, be acquired by individuals or associations under the provisions of that act.

DEPARTMENT OF JUSTICE,
August 31, 1862.

SIR: I have the honor to acknowledge the receipt of your communication of the 20th instant, submitting for my official opinion the question whether or not title to public lands producing diamonds can be acquired by individuals or associations under the act of Congress entitled "An act to promote the development of the mining resources of the United States," approved May 10, 1872.

Section 1 of said act provides, "That all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

Section 6 of said act also provides the mode in which a patent may be obtained for land claimed and located for "valuable deposits."

Bainbridge, in his work on the law of mines and minerals, (page 1,) says: "A mineral has been defined to be a fossil, or what is dug out of the earth. The term may, however, in the most enlarged sense, be described as comprising all the substances which now form or which once formed part of the solid body of the earth, both external and internal, and which are now destitute of and incapable of supporting animal or vegetable life. In this view it will embrace as well the bare

Mineral Lands.

granite of the high mountain as the deepest hidden diamonds and metallic ores."

Webster gives the following as the definition of a diamond : "A mineral and gem remarkable for its hardness, as it scratches all other minerals."

Diamonds are found under a variety of circumstances, and are generally obtained by mining. They are procured in India and South Africa by digging pits in the earth down to a peculiar stratum called the diamond-bed. In Brazil they are washed out of an agglomerate composed of rounded white quartz pebbles and a light-colored sand.

Diamonds, then, are clearly "valuable mineral deposits," and the provisions of said act are as applicable to lands containing them, as to lands containing gold or other precious metals. Comprehensive words, no doubt, were used to include as well what might afterward be discovered as what might be overlooked in an enumeration of minerals in the statute.

Public lands for the purposes of sale are divided into agricultural and mineral lands. The minimum price of the former is \$1.25 and the latter \$5 per acre. Mineral lands, exclusive of their valuable deposits, are generally worth little or nothing. Prior to the act of July 26, 1866, (14 Stat., 257,) it was customary for persons to take those deposits without respect to the rights of the United States. Congress then provided a way in which persons locating lands for mining purposes might acquire title, and other acts have since been passed promotive of the same end.

I think these acts ought to be most liberally construed, so as to facilitate the sale of such lands ; for in that way, and not otherwise, can they be made to contribute something to the revenue of the Government, and controversy and litigation in mining localities, to a great extent, be prevented.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. C. DELANO,
Secretary of the Interior.

Case of Nelson H. Davis.

CASE OF NELSON H. DAVIS.

The purpose of the act of June 8, 1872, chap. 351, is to put Nelson H. Davis in the same grade in the Inspector-General's Department, and in the same place relatively in that grade, which he would now hold and occupy had he been regularly promoted to fill the vacancy in that department caused by the death of Inspector-General Henry Van Rensselaer on the 23d of March, 1864.

That purpose will be effected by appointing him to the office of Inspector-General, to take rank next after Colonel Schriver; and this would necessarily make him (as by the statute he is entitled to be) senior in rank to Colonel Hardie.

DEPARTMENT OF JUSTICE,
September 16, 1872.

SIR: I have the honor to acknowledge the receipt of your letter of the 12th of July last, in which reference is made to the recent act of June 8, 1872, authorizing the appointment of Nelson H. Davis, of the Inspector-General's Department, "to the rank and place therein to which he is entitled, and which he would have held had the law of promotions by seniority under the act of March 3, 1851, and the Army Regulations of 1863, been carried out," and in which you present for my consideration the following questions:

"1. What date of rank is he (Davis) entitled to?

"2. Is he entitled to seniority of rank over Colonel and Inspector-General James A. Hardie?"

It appears that on the 23d of March, 1864, a vacancy occurred in the Inspector-General's Department by the death of Inspector-General Henry Van Rensselaer. The Department at that period consisted of four inspectors-general, with the rank of colonel, the name of the deceased standing third on the list, and five assistant inspectors-general, with the rank of major, among whom Nelson H. Davis was the senior officer. In consequence of the death of Colonel Van Rensselaer, Colonel Edmund Schriver, who was next on the list of inspectors-general, was advanced; and on the 24th March, 1864, James A. Hardie, then an assistant adjutant-general, with the rank of major, was appointed to the vacant

Case of Nelson H. Davis.

inspector-generalship, taking his place on the roll next to Colonel Schriver.

At the time of this appointment an appeal was made to the War Department by Major Davis, claiming that the law of promotions by seniority, under the act of March 3, 1851, and the Army Regulations of 1863, *entitled him* to the appointment; but the Department denied the claim, holding that the law of promotions by seniority did not apply to the filling of the vacancy mentioned. Subsequently that officer laid his case before Congress, and the result was the passage of the aforesaid act of June 8, 1872.

Viewing this act in connection with the circumstances which gave rise to it, there can be no doubt as to its meaning and object. It manifestly proceeds on the assumption that the law of promotions by seniority was applicable to the filling of the vacancy in the Inspector-General's Department caused by the death of Colonel Van Rensselaer, and that there had not been a compliance with this law; and it affirms the right of Davis to the rank in that department which he would have held had the law been carried out, and authorizes his appointment thereto. The purpose of the act is plainly to put that officer in the same grade, and in the same place relatively in that grade, which he would now hold and occupy had he been regularly promoted to fill the vacancy caused as aforesaid. This may be effected by appointing him to the office of inspector-general, to take rank next after Colonel Schriver. His relative rank would thus be fixed, not by reference to any particular date, but by the terms of the appointment itself, made in pursuance of said act, and being thereby made next in rank to Colonel Schriver, he would necessarily be, as in my opinion he would be entitled to be, senior in rank to Colonel Hardie.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,
Secretary of War.

Money-Orders.

MONEY-ORDERS.

Provisions of the act of June 8, 1872, chap. 335, relating to the issue of money-orders by the Post-Office Department, cited and commented on. *Semble* that Congress designed to give these orders, in some respects, the character of ordinary negotiable instruments, to the end that they might be received with full credit, and their usefulness, in a business point of view, be thus promoted.

The statute does not contemplate that the remitter of the order shall be at liberty to revoke it, and demand back his money, against the will of the payee, after it comes into the possession of the latter; since, to enable the former to obtain a repayment of the funds deposited, he must produce the order.

The payee of the order, upon complying with the requirements of the law and of the regulations of the Post-Office Department, is entitled to payment of the money on demand; and the remitter of the order cannot, previous to its being paid, by any notice that he may give to the office at which it is payable, forbid the payment thereof to the payee.

DEPARTMENT OF JUSTICE,*September 25, 1872.*

SIR: I have duly considered your communication of the 19th instant, desiring my opinion upon the question whether the remitter of a money-order issued by the Post-Office Department, after he has sent the order to the payee, can revoke the same, and is entitled to have payment of the order refused and the money returned to him, without his producing the order.

The large extent to which the money-order system of the Post-Office Department is used for the transmission of small sums from one part of the country to the other makes this a question of great practical importance, and it is likewise one of no little difficulty. I am of opinion that the solution of the question must be found in the statutes establishing the money-order system, and the regulations of the Postmaster-General thereunder, and that very little aid can be derived from the analogy furnished by the mercantile law applying to bank checks, drafts, bills of exchange, and certificates of deposit.

The question is, what does the Post-Office Department, acting under the authority of the acts of Congress, agree to do in respect to any money-order which it issues? Does it in such

Money-Orders.

case make any agreement with the payee named in the order? or is its agreement solely confined to the remitter, who requests the order, deposits the money, and pays the fee charged for issuing the same?

It is very apparent that, in order to make the money-order system of very general service to the community, it is necessary that the person receiving the order, and who, it may be, parts with valuable property or gives a consideration in return for the same, should be able to rely upon its payment, if presented within the time named, and according to the statute and regulations which govern the system. And if, after having sent the order, and after having perhaps received a valuable consideration therefor, the remitter can forbid or stop the payment thereof, the payment of an order would become so uncertain as greatly to interfere with the utility of the system. The question, however, is not whether it would be wise to establish such rules and provisions that the payee shall be certain that the order, if he conforms to the rules of the Department, will be paid, but whether Congress has so provided in the statute.

By the act consolidating the statutes relating to the Post-Office Department, approved June 8, 1872, in section 109, it is provided, "That the Postmaster-General shall furnish money-order offices with printed or engraved forms for money-orders."

Section 111 enacts that no money-order shall be valid and payable unless presented to the postmaster on whom it is drawn within one year after its date, but the Postmaster-General, on application of the remitter or payee of any such order, may cause a new order to be issued in lieu thereof.

Section 112 enacts, "That the payee of a money-order may, by his written indorsement thereon, direct it to be paid to any other person, and the postmaster on whom it is drawn shall pay the same to the person thus designated, * * * but more than one indorsement shall render an order invalid and not payable, and the holder, to obtain payment, shall be required to apply in writing to the Postmaster-General for a new order in lieu thereof, returning the original order."

By section 113 it is provided, "That after a money-order has been issued, if the purchaser desires to have it modified

Money-Orders.

or changed, the postmaster who issued the order shall take it back and issue another in lieu thereof."

In section 114 it is provided, "That the postmaster issuing a money-order shall repay the amount of it upon the application of the person who obtained it and the return of the order."

In section 115 it is provided, "That whenever a money-order has been lost, the Postmaster-General, upon the application of the remitter or payee, may cause a duplicate thereof to be issued."

These provisions, it will be seen, make the money-order, to a certain extent, a negotiable instrument; enable the indorsee, seemingly without the permission of the remitter, to obtain a new order from the Postmaster-General; authorize the Postmaster-General to issue a duplicate in case the money-order has been lost, upon application of the remitter *or payee*; and expressly provide that the postmaster issuing the order shall repay the amount of it upon the application of the remitter *and the return of the order*. Extensive powers are confided by the statute to the Postmaster-General in respect to the form of the order; and the form authorized by him, while omitting the name of the payee, does state the amount for which the order is given.

Although the money and the fee are paid by the remitter of the order, and the contract of the Government is in the first place with him, yet, upon full consideration, I am of opinion that the statute did not intend that the remitter should be able to revoke the order, or to demand back his money against the objection of the payee. He cannot obtain repayment of the money deposited unless he produces the order. The order may be indorsed once, and the indorsee may secure a new order by application to the Postmaster-General. It would seem, therefore, to be the intention of Congress to give these orders in many respects the character of ordinary negotiable instruments, in order that full credit may be given to them, and, consequently, that their use be greatly extended. It was the intention of Congress, as shown by the statute, that the payee or holder of the order shall be able to obtain the money notwithstanding the objection of the remitter, and although the latter may desire to recall it.

Money-Orders.

But if there is any doubt in regard to this, so far as our statutes themselves are concerned, I think that there is another circumstance which renders this view of the question decisive. The money-order system was established in the English post-office department more than thirty years ago, and is principally regulated there now by the statute of 11 and 12 Victoria, chap. 88, passed in 1848, and contained in the 88th volume of the English Statutes at Large, 562, and the systems in the two countries are so similar as to make it very apparent that the English statutes and regulations were considered in draughting the laws establishing our own system. By the English statute above cited, section 111, it is enacted "That it shall be lawful for the postmaster-general at any time hereafter to repay or refund the amount of any money-orders, either heretofore granted or issued to the person or persons to whom the same have been or shall or may be so granted or issued, * * * *whether such money-orders shall remain or be in the possession of such person or persons or not.*"

Under this statute, as you inform me, it has been decided in England by the solicitor of the post-office (and very properly decided) that the remitter can forbid the payment of the order against the protest of his payee; but the omission to insert any similar provision in our own statute, and the insertion of one expressly limiting the power of repayment to cases where the remitter produces the order, seems to me to show conclusively that it was the intention of Congress not to adopt this provision of the English statute, but to increase the credit attaching to the orders by rendering them irrevocable when delivered by the remitter to the payee.

I am of the opinion, therefore, in the cases you mention, that the payee of the money-order is entitled to the money upon demand, and upon complying with the statutes and regulations of the Post-Office Department, notwithstanding the protest of the remitter, and that the remitter of the money-order cannot forbid the payment of it by any notice to the office at which it is made payable before it has been paid. Of course I do not touch upon the question of how far, where there is a dispute of identity, or where it is alleged that the order has been stolen or fraudulently obtained, it would be proper for the postmaster at the office upon which the order has been

Telegraphic Messages for the Government.

drawn to postpone payment until the matter can be inquired into.

If the objection is raised to this construction of the statute that the remitter may sometimes, by the fraud of the payee, lose the consideration which induced him to transmit the order, the answer is that the same liability exists in all cases where money is transmitted, or where an ordinary check or draft is sent, and, as in these cases, he has his remedy against the payee in the courts of law.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. J. A. J. CRESWELL,

Postmaster-General.

TELEGRAPHIC MESSAGES FOR THE GOVERNMENT.

Section 2 of the act of July 24, 1866, chap. 230, requires all telegraph companies which have accepted the rights and privileges conferred by that act, together with the restrictions and obligations thereby imposed, to give priority to messages from officers and agents of the United States to the several Departments, and to transmit them at the rates fixed by the Postmaster-General, whether the messages are received from such officers and agents directly, or through other connecting telegraph-lines.

DEPARTMENT OF JUSTICE,

October 2, 1872.

SIR: I have received your letter of the 1st instant, asking my opinion in respect of the proper interpretation of the act of July 24, 1866, (14 Stat., 221,) as respects the duty of those telegraph companies which accepted the same to convey messages from officers and agents of the United States to the several Departments; and I have no doubt that by section 2 of that act all companies accepting the same are obliged to give such messages priority over all other business, and to transmit them at the rates fixed by the Postmaster-General, whether they receive the messages immediately from officers and agents of the United States, or intermediately from the officers of other telegraphic companies making connections with them. In either case they are "telegraphic communica-

Pardon for Desertion.

tions between the several Departments of the Government of the United States and their officers and agents.”

I have the honor to be, very respectfully, your obedient servant,

CLEMENT HUGH HILL,
Acting Attorney-General.

Hon. WM. W. BELKNAP,
Secretary of War.

PARDON FOR DESERTION.

The President may grant a conditional pardon, and he may remit a part of the penalty or punishment without remitting the whole.

Hence he can pardon a deserter so as to re-enfranchise him, (i. e., remove the disabilities imposed by section 21 of the act of March 3, 1865, chap. 79,) and at the same time make the pardon conditional upon his not becoming thereby entitled to any moneys forfeited; and a condition of this sort would exclude any right to the pay referred to in the joint resolution of March 1, 1870, [No. 18.]

DEPARTMENT OF JUSTICE,
October 3, 1872.

SIR: In your communication of the 31st of August you ask the opinion of the Attorney-General as to whether a pardon for the offense of desertion will re-enfranchise a deserter without giving him the right to the pay to which he would be entitled by the removal of a false charge of desertion, under the joint resolution of March 3, 1870.

By the act of March 3, 1865, section 21, (13 Stat., 490,) it is enacted that, in addition to all the other lawful penalties for the crime of desertion, “all persons who have deserted the military or naval service of the United States * * * shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship and their rights to become citizens, and such deserters shall be forever incapable of holding any office of trust or profit under the United States or of exercising any rights of citizenship thereof.”

By the joint resolution of March 1, 1870, above referred to, (16 Stat., 370,) section 2, it is resolved that “the moneys withheld because of the desertion of any person from the volunteer forces of the United States, who is borne on the rolls as

Buildings on Military Reservations.

a deserter, shall not be paid to him except the record of desertion shall have been canceled, on the sole ground that such record had been made erroneously and contrary to the facts; but such money shall be and remain the property of the National Asylum for Disabled Volunteer Soldiers, for the support of its beneficiaries."

I do not deem it necessary to decide whether or not an unconditional pardon of the President would restore the moneys above referred to, notwithstanding this act of Congress, to a deserter; for as it is well established that the pardon of the President may be conditional, and may remit a part of the sentence or penalty without remitting the whole, I am clearly of the opinion that the President can pardon a deserter so as to re-enfranchise him, and at the same time make the pardon conditional upon his not being entitled to any moneys which he has forfeited by the crime of desertion; and such conditional pardon would enfranchise any such person, without giving him any right to the pay referred to in the joint resolution of March 1, 1870.

I have the honor to be, sir, your very obedient servant,
CLEMENT HUGH HILL,
Acting Attorney-General.

Hon. WM. W. BELKNAP,
Secretary of War.

BUILDINGS ON MILITARY RESERVATIONS.

Buildings erected on military reservations by post-traders, under a license from the War Department, for the purposes of trade, are not to be regarded as such buildings would be if placed there by trespassers; that is to say, as constituting a part of the realty.

A trader, when he removes from his post at a military reserve, has a right to remove the buildings which were erected thereon by him under such license, and is at liberty to dispose of the materials thereof as his own property.

But the license to erect such buildings, being purely personal to the trader, does not carry with it any right to lease or convey the same to others for their occupation and use, without the permission of the military authorities; his rights are confined solely to that of removing the buildings from the premises.

Buildings on Military Reservations.

DEPARTMENT OF JUSTICE,
October 3, 1872.

SIR: I have duly considered the questions which you ask the Attorney-General in your letter of the 11th instant, and which are as follows:

Where persons, such as post-traders, contractors, and others, have been allowed by proper authority to erect buildings to facilitate their business upon a military reserve, with no restriction as to the term during which they shall be allowed to remain, 1. Are such buildings, after the removal of the trader, contractor, or other person from the reserve, still his personal estate, and, as such, has he the right to dispose of them by rent, lease, or sale to other persons? 2. Does not such property become part of the realty after the appointment of a trader is revoked, or a contractor has fulfilled his contract, or any event happens which dissolves their business connection with the reserve?

By the order of the Secretary of War of June 17, 1871, (a copy of which you inclose to me,) it is provided that—

“Post-traders, appointed under the authority given by the act of July 15, 1870, will be furnished with a letter of appointment from the Secretary of War, indicating the post to which they are appointed. They will be permitted to erect buildings for the purpose of carrying on their business upon such part of the military reservation or post to which they may be assigned as the commanding officer may direct; such buildings to be within convenient reach of the garrison. They will be allowed the exclusive privilege of trade upon the military reserve to which they are appointed, and no other person will be allowed to trade, peddle, or sell goods by sample or otherwise within the limits of the reserve. They are under military protection and control as camp-followers.”

Buildings erected by post-traders on a military reserve, in conformity to this order, are erected for the mutual benefit of the Government and the trader, and are not to be regarded as buildings would be if erected by trespassers, or even by tenants under leases in which no provision is made therefor. They are erected under a license from the Government, and for the mutual benefit of both parties.

Metropolitan-Police Accommodations.

Under these circumstances, I am of opinion that, by the proper construction of the license, these buildings were not intended to become a part of the realty after their erection, but were to continue the property of the traders, and, therefore, when a trader is removed from his post, I have no doubt that he has a right to remove the building from the place where it was erected, and, when removed, he can dispose of the materials as his own property.

But it is very clear that the license to erect such buildings is a purely personal one, and is granted for one purpose only. Therefore, under such license, the person so erecting the building would have no right to rent or lease the same, or even to sell it to another post-trader, without permission of the military authorities, but his rights are confined solely to that of removing the building from the reserve. Undoubtedly the property in such a building might, with the approval of the commanding officer, be transferred to another post-trader, and such permission would have the same force as a license to a new post-trader to erect such a building at that spot.

I return you the papers enclosed.

I have the honor to be, your obedient servant,
CLEMENT HUGH HILL,
Acting Attorney-General.

Hon. WM. W. BELKNAP,
Secretary of War.

METROPOLITAN-POLICE ACCOMMODATIONS.

The 15th section of the act of August 6, 1861, chap. 62, was entirely superseded by the act of February 21, 1871, chap. 62, and no longer imposes any duty or confers any authority in regard to providing accommodations for the police force of the District of Columbia, this subject clearly falling within the legislative power given by the latter statute to the legislative assembly of the District.

DEPARTMENT OF JUSTICE,
October 11, 1872.

SIR: I have had under consideration the communication addressed to your Department by the president of the board of

Eight-Hour Law.

metropolitan police of the District of Columbia, dated the 13th ultimo, a copy of which was transmitted to the Attorney-General by the Hon. W. H. Smith, acting secretary, in a letter of the 24th ultimo, requesting an opinion relative to providing accommodations for the police force, etc., under the 15th section of the act of August 6, 1861, (12 Stat., 323.)

That section, I think, has been entirely superseded by the act of February 21, 1871, "to provide a government for the District of Columbia," (16 Stat., 419,) and, consequently, no longer imposes any duty or confers any authority in regard to the subject mentioned. The providing of police accommodations clearly falls within the legislative power given by the act of 1871, and I observe that the legislative assembly of the District have acted in accordance with this view, and passed appropriations to furnish station-houses, etc., (see acts of August 15 and 19, 1871, Laws of the First Session of the First Legislative Assembly, pp. 35, 67.)

Thus, the question submitted by the president of the board of police appearing to be one that cannot now arise, an opinion thereon is deemed unnecessary, and none is given.

I have the honor to be, &c.,

B. H. BRISTOW,

Solicitor-General and Acting Attorney-General.

Hon. C. DELANO,

Secretary of the Interior.

EIGHT-HOUR LAW.

Section 2 of the act of May 18, 1872, chap. 172, relating to the settlement of accounts for the services of laborers, workmen, and mechanics employed by the Government between June 25, 1868, and May 19, 1869, was designed to have a broad and liberal construction; and, interpreted in this wise, its provisions may be taken to include all persons who were thus employed and paid by the day, although they may not come within the description of "laborers, workmen, and mechanics," regarding these words in their more strict signification.

DEPARTMENT OF JUSTICE,

October 24, 1872.

SIR: I have duly considered the question proposed by you to this Department in your letter of the 23d instant, in regard

Eight-Hour Law.

to the proper construction of the act of May 18, 1872, section 2, (17 Stat., 134.)

By the act of June 23, 1868, (15 Stat., 77,) it was enacted "that eight hours shall constitute a day's work for all laborers, workmen, and mechanics now employed or who may be hereafter employed by or on behalf of the Government of the United States." Under this act it was at first a question whether it was the intention of Congress that persons who worked only eight hours a day should receive the full compensation which had previously been given for a day's work; and at first full payment was not allowed them. Afterward, by proclamation of the President, full wages for a day's work were allowed to all persons, although under this act they only worked eight hours a day. It was to meet this case that the section to which you have called my attention was enacted, and that provides: "That the proper accounting officers be, and hereby are, authorized and required, in the settlement of all accounts for the services of laborers, workmen, and mechanics employed by or on behalf of the Government of the United States, between the 25th day of June, 1868, the date of the act constituting eight hours a day's work for all such laborers, workmen, and mechanics, and the 19th day of May, 1869, the date of the proclamation of the President concerning such pay, to settle and pay the same without reduction on account of reduction of hours of labor by said act, when it shall be made to appear that such was the sole cause of reduction of wages, and a sufficient sum for said purpose is hereby appropriated, out of any money in the Treasury not otherwise appropriated."

I am strongly inclined to the opinion, considering the history of congressional legislation upon this subject, and particularly in view of the recent decision of the Supreme Court in the "Twenty-per cent. Cases," (13 Wall., 568,) that this statute is to have a broad and liberal construction, and that the above case is decisive against limiting its provisions to those who would fall in strict language within the terms "laborers, workmen, and mechanics." On the contrary, I think it was the intention of Congress to include within the provisions of this act, and of the previous act of 1868, all persons who are employed and paid by the day. It clearly does not extend to

Duty on Silk and Cotton Ribbons.

persons who are paid regular salaries, but is limited to employés who are paid a day's wages for a day's work; and its purpose was to fix the number of hours which thereafter was to be considered as a day's work and entitling the workman to a day's wages. If there is in the employment of the Government any class of persons so employed and paid, I think they are entitled to the benefit of this act, although in common parlance they might not come within the strict definition of laborers, workmen, and mechanics.

I have the honor to be, sir, your very obedient servant,
CLEMENT HUGH HILL,
Acting Attorney-General.

Hon. WM. W. BELKNAP,
Secretary of War.

DUTY ON SILK AND COTTON RIBBONS.

Silk and cotton ribbons, of which silk is the component material of chief value, fall within the last paragraph of the 8th section of the act of June 30, 1864, chap. 171, and are subject to a duty of 50 per cent. *ad valorem*.

DEPARTMENT OF JUSTICE,
November 1, 1872.

SIR: I have the honor to acknowledge the receipt of your communication of the 8th instant, and the accompanying papers, in relation to the classification of "silk and cotton ribbons," of which silk is the component material of chief value, under the 8th section of the act of June 30, 1864. (13 Stat., 210.)

It seems that prior to December 19, 1870, ribbons of the description mentioned, other than velvet ribbons, were regarded by your Department as falling under the last paragraph of that section, and subject to a duty of 50 per cent. *ad valorem*; that silk and cotton *velvet* ribbons, of which silk is the material of chief value, were classified as "velvets," under the second paragraph of the same section, and a duty of 60 per cent. *ad valorem* charged thereon; while linen and cotton ribbons were placed under those sections of the act which relate to manufactures of cotton, flax, etc. (Sections 6 and 7.)

Duty on Silk and Cotton Ribbons.

At the May term, 1870, of the circuit court of the United States for the district of Massachusetts, in the case of *Lane vs. Russell*, the precise question arose whether silk and cotton velvet ribbons, silk being the component material of chief value, are subject to a duty of 60 per cent. *ad valorem*, under the said 8th section; and the court decided that they are subject to that duty. This decision appears to have been based on the idea that such articles are "ribbons" within the meaning of that section. Thus the Department and the court, while they coincided as to the duty to which these articles are chargeable under the statute, differed in their views respecting the particular grounds of their liability.

Acting upon the interpretation of the statute conceived by the Department to have been given it by the court, according to which "silk and cotton ribbons" were thought to be chargeable with the same duty as "silk and cotton velvet ribbons," the Department, on the 19th of December, 1870, abandoned its previous ruling as to the classification of the former articles, and thereafter subjected them to a duty of 60 per cent. *ad valorem*, under the designation of "ribbons."

And the question now presented, as you state it, is whether your Department should "return to its former ruling, assessing duty on silk and cotton ribbons, silk chief value, at 50 per cent. *ad valorem*."

I have carefully examined the papers submitted by you touching this subject, among which is a communication from the Solicitor of the Treasury on the same subject, in whose views I in the main concur. In that paper the Solicitor says:

"My own opinion is, after much consideration, that Congress never intended that any ribbons but silk ribbons should be charged with the highest rate of duty.

"It will be observed that the different portions of the act are quite carefully subdivided. There is a cotton section, a linen section, and a silk section. The presumption is, in my judgment, that the silk section of the act referred to means purely silk or silk goods, unless there are express words limiting or qualifying this general intent. In this view, as I understand, the Department has held only dress and piece

Duty on Silk and Cotton Ribbons.

silks, wholly of silk, to be subject to the 60 per cent. rate, while dress and piece silks of *silk* and cotton are subject to the 50 per cent. rate. Silk velvets or velvets are accompanied by qualifying words, evidently intending and actually making an exception to the general plan and intent of the section, those goods being charged with a duty of 60 per cent. if only their component material of chief value is composed of silk.

“Nor does the grammatical construction of the sentence allow the description and qualifying words applicable to *silk velvets*, and velvets, to be applied to ribbons. Or, if they should be or have been applied to ribbons, with exactly the same reason they should be applied to dress and piece silks.

“To my mind the plain intent of the 8th section is that the various forms of pure silk first enumerated are subject to their respective rates of duty, and then dress and piece silks, silk ribbons, (that is, goods wholly of silk,) and, finally, silk velvets, or velvets of which silk is the component material of chief value, are subject to 60 per cent., and that dress and piece silks and ribbons not wholly of silk, but of which silk is the component material of chief value, come under the last clause of the section, and are subject to 50 per cent. duty. * * * * *

“But one single class of ribbons was involved in that case, (*Lane vs. Russell*,) whereas it is well known there are many other classes. No presentation was, therefore, made of a case involving all the various forms of ribbons, nor was the court called upon to consider carefully the application of all the various provisions of the act to all the various forms of ribbons. * * * * *

“A return by the Department to its former rule would recognize a graded system of duties, which would apparently correspond with the relative value of the several classes of goods to which reference has been made, and would at once strike the mercantile sense as entirely just and proper, as well as in accordance with a correct construction of the law.”

I have to add as to this decision of the court in the case of *Lane vs. Russell*, that the question submitted and decided was as to the duty to be imposed upon silk and cotton *velvet* ribbons, silk being the component material of chief value,

(Members of Congress Elect.)

and that the application of this decision to linen and cotton or silk and cotton ribbons not velvet, is an inference from the argument of the court, which inference is manifestly in conflict with the legislative intent of the tariff act of June 30, 1864. Compliance with that decision did not, therefore, in my judgment, necessitate a departure by the Department from its first ruling upon the subject of ribbons, and my opinion is that the law requires a return by the Department to that ruling.

Very respectfully,

GEO. H. WILLIAMS.

Hon. WM. A. RICHARDSON,
Acting Secretary of the Treasury.

MEMBERS OF CONGRESS ELECT.

By the act of July 11, 1864, chap. 119, a member of Congress elect is, previous to as well as after taking the oath of office, debarred from acting as counsel for parties, and from prosecuting claims against the Government, before any Department, court-martial, bureau, officer, or any civil, naval, or military commission, if he has received or has agreed to receive any compensation whatever, directly or indirectly, therefor.

DEPARTMENT OF JUSTICE,

November 2, 1872.

SIR: Your letter of the 31st ultimo refers to a communication addressed to you, under date of the 28th ultimo, by Hon. William M. Lawrence, member of Congress elect, in which he states that he has been asked to appear before the War Department or the Judge-Advocate General in behalf of a United States officer recently convicted by a court-martial, and asks whether in view of the acts of July 11, 1864, (13 Stat., 123,) and July 16, 1862, (12 Stat., 577,) a member of Congress elect is, previous to his taking the oath of office, debarred from acting as counsel for parties arraigned before United States tribunals, or from prosecuting claims for private individuals against the United States; which question, at the instance of Mr. Lawrence, you refer for my opinion.

I have the honor to reply as follows:

The first clause of the act of July 16, 1862, prohibits members of Congress from taking or receiving, directly or indi-

Members of Congress Elect.

rectly, or agreeing to receive from any person or persons, any money, property, or other valuable consideration, for procuring or aiding to procure any *contract, office, or place* from the Government, or any Department thereof, or from any officer of the United States, for any person or persons whatsoever, or for giving or bestowing any such *contract, office, or place* to any person whomsoever.

The prohibition in this clause is laid upon members of Congress—not members-elect, but those who have taken the oath of office and qualified.

A subsequent clause prohibits members of Congress, from *the time of their election as such*, from receiving or agreeing to receive any money, property, or other valuable consideration, for attention to services, action, vote, or decision on any question, matter, cause, or proceeding which may then be pending, or may by law or under the Constitution be brought before them in their place as such members of Congress.

Without stopping to consider whether the case stated by Mr. Lawrence comes within the prohibitions of this act, it will be sufficient to state the provisions of the act of July 11, 1864, evidently passed for the purpose of more effectually guarding against the mischief intended to be provided against in the first clause above cited of the act of 1862. The act of 1864 is more comprehensive in terms, its prohibitions being directed to members of Congress from the time of their election, to heads of Departments, heads of bureaus, clerks, and every other officer of the Government, forbidding each and all of them to receive any compensation whatsoever, directly or indirectly, for any services rendered or to be rendered to any person, either by themselves or another, in relation to any *proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing* in which the United States is a party or *directly or indirectly* interested, before any Department, court-martial, bureau, officer, or any civil, naval, or military commission whatever.

This act is too plain in its terms to require exposition. Members of Congress elect cannot lawfully receive compensation for services rendered by them as counsel or otherwise in the instances mentioned in the act, and Mr. Lawrence is

Military Reservation at Fort Leavenworth.

clearly debarred from acting as counsel in the case referred to in his communication to you if he has received or shall agree to receive any compensation whatever, directly or indirectly, therefor.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,

Secretary of War.

MILITARY RESERVATION AT FORT LEAVENWORTH.

The provisions of the acts of July 20, 1868, chap. 179, and July 27, 1868, chap. 238, granting to railroad companies rights of way through the Fort Leavenworth military reservation, are to be construed strictly as against the grantees of such rights.

The grant made by those acts does not impart to the railroad companies referred to the right to establish cattle yards or pens, or build structures for a like purpose, either in the roadway or elsewhere upon said reservation.

DEPARTMENT OF JUSTICE,

November 5, 1872.

SIR: I have the honor to acknowledge the receipt of your communication of the 18th instant, submitting for my official opinion the question "whether the acts of Congress granting right of way to railroad companies through the military reservation at Fort Leavenworth authorize them to erect such structures within the limits of the right of way as they may choose, or whether the privilege granted them by the said acts was simply for the construction of their roads."

From the papers and map which accompany your communication, it appears that the Chicago and Southwestern Railroad Company have constructed from a point within the reservation two tracks for their road, leading to Leavenworth City, one for passenger and one for freight cars, and between these tracks, at a distance of 300 feet from each, another leading to a cattle-yard, established for the use of the company.

The acts of Congress referred to are the act of July 20, 1868, authorizing the construction of a bridge across the Missouri River, the 3d section of which provides "that for the use of railroads leading to said bridge from either side of the river there is hereby granted a right of way through said

Military Reservation at Fort Leavenworth.

Fort Leavenworth military reservation, not exceeding for all said roads 300 feet in width, provided that said roads do not in any way interfere with the public buildings on said military reservation," and the act of July 27, 1868, granting severally to two railroad companies the right of way, not exceeding 100 feet in width for each, "to construct and operate a railroad across and over the military reservation at Fort Leavenworth * * * upon such line as shall be designated and fixed by the Secretary of War."

According to well-recognized rules of law, these acts should be construed strictly against the grantees. (*Mills et al. vs. Saint Clair County*, 8 How., 581.) Justice Clifford, delivering the opinion of the court in the case of *Rice vs. Railroad Company*, (1 Black, 358,) says: "Whenever privileges are granted to a corporation, and the grant comes under revision in the courts, such privileges are to be strictly construed against the corporation and in favor of the public, and that nothing passes but what is granted in clear and explicit terms." Whether the railroad companies have the right to erect structures within the limits of the grant made to them by said acts is partly a question of fact as well as of law. All rights necessary to enable them to construct and operate their roads are undoubtedly conveyed by the grant. (*Appleton vs. Fullerton*, 1 Gray, 186.)

Admitting that to operate a railroad successfully in Kansas it is necessary to have cattle-yards connected with the road, it does not follow that wherever there is a right of way for such a road there is a right also to have such yards. To grant to a railroad company a right of way through the streets of a city would not imply a right of the company to build cattle-yards in such streets, while under some circumstances such a grant through wild public lands might be construed to give that right. Associated with the idea of a military reservation are those ideas as to use and appearance which make it doubtful whether Congress intended to give to the companies any more than, after the construction of a suitable road, the right of transit with their trains thereon; but be that as it may, it is clear to my mind that Congress did not intend to give to the companies the right to erect unsightly or offensive structures upon the reservation. Assum-

 Claim of C. A. Perry & Co.

ing it to be true that (as the commanding general states) "the establishing of cattle-yards anywhere within the limits of the reservation will seriously interfere with the public interests," it thence follows, in my judgment, that such structures are not warranted by law.

Possibly it may be more convenient, but it cannot be indispensable to the operation of the railroad to have cattle-yards located inside instead of outside of the reservation; and it is too plain for controversy that the erection and ordinary use of such inclosures are wholly incompatible with the military use of the reservation. Congress evidently made the grant with a view to the continued use and enjoyment of the reservation by the military; and it seems to me, therefore, that the railroad companies have no right to interfere with those ends further than the reasonable necessities of their roads and the business upon them may require.

I cannot, upon the information I have as to the circumstances of the reservation and railroads running through it, decide definitely as to whether any building or structure connected with such roads is allowable within the right of way across the reservation; but I am clearly of the opinion that the right of way granted by said acts does not give to the railroad companies the right to build or have cattle-yards, or structures of a like description, in their roadway or elsewhere upon said reservation.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,
Secretary of War.

 CLAIM OF C. A. PERRY & CO.

The facts and circumstances presented in this case failing to show that the claimant's property was destroyed while in the military service of the United States, either by impressment or contract: *Held* that the claim is not within the provisions of the 2d section of the act of March 3, 1849, chap. 129.

DEPARTMENT OF JUSTICE,

November 19, 1872.

SIR: I have the honor to acknowledge the receipt of your communication of the 28th ultimo, inclosing the findings of

Claim of C. A. Perry & Co.

fact by the Second Comptroller in the matter of the claim of C. A. Perry & Co. to compensation for cattle, wagons, &c., lost or destroyed in accompanying the march of the United States military forces into Utah in the autumn of 1857, and requesting my opinion whether their claim is within the provisions of the 2d section of the act of March 3, 1849, (9 Stat., 414,) which provides for the payment for horses and other property lost or destroyed "while in the military service of the United States, either by impressment or contract."

In this case I understand the claim to be that the property in question was lost or destroyed while in the military service by impressment.

The Comptroller states the facts as follows:

"First. That the following order was issued to one of the claimants:

"HEADQUARTERS ARMY OF UTAH,
"SOUTH PASS, EN ROUTE TO SALT LAKE CITY,
"October 19, 1857.

"SIR: The colonel commanding directs me to inform you, in reply to your letter of to-day, that no goods or supplies of any kind will be permitted to pass the Army for Salt Lake City or other point in the possession of the Mormons, nor any communication whatever to be had with them so long as they manifest a hostile attitude to the Government of the United States.

"F. J. PORTER,
"Assistant Adjutant-General.

"To J. C. IRWIN, Esq.'

"Second. That prior to the issue of said order the train of the claimants, *en route* for Salt Lake City, pursued its journey subject only to the direction or control of its owners or agents.

"Third. That by order of Colonel Johnston, the merchant-trains, included in which was the train of the claimants, were assigned a position in the rear of the Army trains proper, and of the Army contractors' trains; that the entire train stretched out eight or ten miles in length; that the daily march was regulated by military order; that all the trains were always subject to military control, and orders were

Claim of C. A. Perry & Co.

given that the oxen should not be sent beyond the outposts of the Army; that the military authorities did not furnish forage to the oxen, mules, &c., and at night they were kept by order within the line of guards.

"Fourth. That the discipline and control thus exercised over the said trains were in accordance with the regulations of the Army, and for the safety of said trains, as in time of war or in marching through a hostile country.

"Fifth. That in consequence of the severity of the weather, exposure to the cold, and scarcity of forage, many of the oxen, mules, and horses of said trains perished.

"Sixth. That the stock, both public and private, had become so much reduced, that on or about the 15th of November the Army was broken into small parties to move into Fort Bridger, and the stock left, including claimants', was used indiscriminately in hauling the public and private wagons.

"Seventh. That there was no contractor agreement for such use of claimants' oxen, mules, and horses, nor was there any order, oral or in writing, expressly directing the impressment of this particular train and property, but in the order (No. 36) of October 24, 1857, by Adjutant McNab, it was named as a supply-train, and moved under military control."

Do these findings (upon which I exclusively base my opinion) show that the property of the claimants was impressed into the military service of the United States? Construing the words of the statute negatively, it may be said that they do not apply to every interference with or trespass upon the use or possession of property by military authority, nor would the control or destruction of property by such authority necessarily give the owners a claim for it under the statute. There must be an appropriation of the property, or, in other words, it must be taken by the military for public use, before the right to compensation arises under this act. Owners of property may have a right to sue military officers for trespass, or may have a claim, for the payment of which Congress ought especially to provide; but to establish a claim under the statute in question, it ought to appear, it seems to me, that the property was taken for and used in the service of the United States.

Claim of C. A. Perry & Co.

Colonel Johnston's order, quoted in the Comptroller's statement, at most only interdicted the advance of merchant trains, of which claimants' was one, into the Mormon country. Whether this order was made from apprehension that the Mormons would destroy the property if it came within their reach, and so despoil the owners, or whether it was intended to cut off supplies to the enemy, does not appear, nor does it appear that such order was contrary to the judgment and wishes of the claimants. According to the seventh finding of the Comptroller, no oral or written directions were given for the impressment of this property, and the only room for controversy is, therefore, as to whether or not it was impressed by implication. If Colonel Johnston did not order claimants' property for the use of the Army, then it is quite clear that he did not intend to have it taken for any such purpose. There was ample time and opportunity for an order of that kind, if such an idea was entertained; but it is not pretended that when the merchant-trains and troops came together, Colonel Johnston's army needed more transportation or supplies than they then had. The presumption is as fair as any other that these merchant-trains became from that time forward an incumbrance and not an aid to the expedition. That the merchant-trains were subject to military control, and that they were designated in a lieutenant's order as supply-trains, hardly warrant the supposition that they were forced into the service of the United States. If the owners of these trains, finding for any reason that they could not get to Salt Lake City in advance of the Army, chose to accompany the troops, they would, of course, subject themselves to the regulations of the Army, and they were probably designated as supply-trains to distinguish them from the other Army trains. What difference does it make what they were called, when in point of fact they were not used as supply-trains for the Army? All the property remained under charge of the owners, their agents and servants, and neither the agents nor the property in their charge were engaged in any service or in any manner employed or used in connection with the operations of the Army. Suppose the troops and trains had arrived safely in Salt Lake City, can it be pretended that the owners of the trains would have had any claim against the United States for services rendered to the expedition?

Claim of C. A. Perry & Co.

The sixth finding of the Comptroller states, that in consequence of the extreme severity of the weather, and the consequent reduction and suffering of the stock, public and private, the Army was, about the 15th of November, "broken into small parties, to move into Fort Bridger, and the stock left, including claimants', was used indiscriminately in hauling the public and private wagons."

The indiscriminate use of cattle in that time of difficulty and distress does not prove that the Army had need of means for the transportation of its own supplies, or that there was therefore a necessity to press into service the animals belonging to the claimants, or that these, or any of them, were actually so impressed.

The expedition being divided into small parties, and the new order of marching formed, in the haste natural to the occasion it was of no importance whether the Government animals or those belonging to the claimants were used to move a wagon. There was a common struggle among all to save, if possible, public and private property from destruction, and the service of the United States under these circumstances may have been as valuable to claimants as were their services to the United States.

Reference is made in support of the claim to *Harmony vs. Mitchell*, (13 How., 115;) but that was an action of trespass, and not a claim under the said statute of 1849, which only provides for payment where the property is lost or destroyed "while it was *actually* employed in the service of the United States." In that case, too, the court say that the plaintiffs "wagons and mules were used in the public service."

Attorney-General Bates, in the case of the Porters, who were owners of one of the said merchant-trains, gave an opinion in favor of their claim. (10 Opin., 21.) I am not informed as to the statement of facts upon which that opinion was founded, but I do not disagree with him as to the law. He says: "An impressment is a taking into public service by compulsion. * * * I understand service to mean the voluntary or involuntary subjection of one's conduct to the control of another for the benefit of that other." There is no finding before me that claimants' train was taken into public service by compulsion, or that it was employed for the benefit

Sea-Service in the Navy.

of the United States, or indeed that it was in any way taken into the public service.

I cannot avoid the conclusion that the claimants in this case, finding themselves obstructed in their way to Salt Lake City by the hostility of the Mormons or the order of Colonel Johnston, or both, concluded that their best course, under the circumstances, was to join and accompany the Army, and that they now seek to make the Government responsible for the early and unexpected storms of winter, which were alike disastrous to public and private property.

I do not think that the facts, as they are presented to me, show that the claimants' property was destroyed while it was actually in the military service of the United States, by impressment or otherwise.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. GEO. S. BOUTWELL,

Secretary of the Treasury.

SEA-SERVICE IN THE NAVY.

The construction given by the Navy Department to the 3d section of the act of March 2, 1867, chap. 174, "to amend certain acts in relation to the Navy," which requires officers transferred from the volunteer to the regular Navy to be credited with their previous sea-service, concurred in; namely, that to entitle an officer to credit for sea-service thereunder he must have been in the volunteer Navy at the time of his appointment to the regular Navy, and that where he had ceased to be an officer in the volunteer Navy prior to such appointment, however brief the interval, he does not come within the provision referred to.

DEPARTMENT OF JUSTICE,

November 20, 1872.

SIR: I have the honor to acknowledge the receipt of a communication of the 30th ultimo from the Acting Secretary of the Navy, stating that Sailmaker Thomas S. Gray, of the Navy, claims credit for volunteer service in the Navy, and asking for my opinion as to the proper construction of the 3d section of the act to amend certain acts in relation to the Navy, which is as follows: "That the officers of the volun-

Detention of Mail-Matter.

teer naval service, who are, or may be, transferred to the regular Navy or Marine Corps, shall be credited with the sea-service performed by them as volunteer officers," &c. (14 Stat., 516.)

It is stated in the letter of the Acting Secretary that, "according to the construction now given by the Department to this law, an officer must have been in the volunteer Navy at the time of his appointment in the regular Navy to entitle him to credit for his volunteer service, and that if he had been mustered out, and was not an officer in the volunteer Navy, however brief the interval, before his appointment in the regular Navy, the credit is not allowed."

I concur in this construction. When an officer is transferred from the volunteer naval service to the regular Navy, he is taken out or removed from one to the other; and in no sense can he be said to be an officer transferred, when he is a private citizen at the time of his appointment. I do not think it makes any difference whether a long or short time elapsed after the appointee asking for credit was mustered out of the volunteer service; for if he was mustered out at all he could not be transferred.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. GEO. M. ROBESON,

Secretary of the Navy.

DETENTION OF MAIL-MATTER.

No authority is conferred upon the Postmaster-General by the provisions of the 301st and 302d sections of the act of June 8, 1872, chap. 335, or by the provisions of any other section of that act, to order the detention of mail-matter after it has reached its destination and been distributed by the postmaster ready for delivery, though there may be a well-grounded suspicion that it is or has been attempted to be circulated in violation of law.

DEPARTMENT OF JUSTICE,

November 29, 1872.

SIR: I have received your communication of the 26th instant, inclosing a copy of a letter addressed to you by Calvin

Detention of Mail-Matter.

G. Child, esq., United States attorney for the district of Connecticut, on the 19th instant, stating the arrest of a person at Stamford, Connecticut, "for using the mails to circulate obscene literature," in violation of the provisions of section 148 of the act of June 8, 1872, generally known as the Postal Code, (17 Stat., 302;) also another, (original,) addressed to you by Mr. Child, under date of the 23d instant, stating that since this arrest mail-matter has accumulated at the same office, consisting of about twenty *retained letters*, say six or seven *apparently* containing an inclosure, and a few differing in no respect in *appearance* from ordinary letters; all under seal.

In reference to these communications of the district attorney, you submit the question whether, under the 301st section of said act, which forbids the use of the post-office establishment for the conveyance of correspondence, opened or intended to be opened, &c., with intent to defraud, &c., and the 302d section, which provides for the disposition to be made, under the direction of the Postmaster-General, of "all letters, packets, or other matter which may be seized or detained for *violation of law*," or in virtue of other portions of the act, the Postmaster-General is empowered to order the detention of such unlawful mail-matter by the postmaster or other agent of the Department after it has reached its destination and been distributed by the postmaster ready for delivery.

In reply I have to say, that I do not think that such authority is conferred upon the Postmaster-General by the sections mentioned, or, upon a careful examination of the act, by any other of its provisions.

There may be a well-grounded suspicion on the part of the postmaster and the district attorney that the mail-matter referred to is or has been attempted to be circulated in violation of law, but this suspicion cannot be verified except by breaking the seals under which the letters or circulars of which it is supposed to consist are inclosed; a proceeding not authorized by any provision of the act in such or any other case; but, on the contrary, expressly forbidden by the *proviso* to section 300, which is as follows: "*Provided*, That nothing in this act contained shall be so construed as to au-

Claim of the Assignees of Simeon Hart.

thorize any postmaster or other person to open any letter not addressed to himself."

The letter of the district attorney is herewith returned.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. J. W. MARSHALL,

Acting Postmaster-General.

CLAIM OF THE ASSIGNEES OF SIMEON HART.

In May, 1861, Simeon Hart, then a resident of New Mexico, delivered commissary stores to the Government at certain military posts in that Territory, for which he received a voucher from the proper officer, but payment thereof was withheld, in consequence of an order issued from the War Department during the same month. Hart subsequently took an active part in the rebellion, but was pardoned by the President in November, 1865. He afterward assigned said voucher to two creditors, loyal persons, by whom payment of the same is now demanded. On a question whether payment is prohibited by the joint resolution of March 2, 1867, [No. 46]: *Held* that the case presented is not within the prohibition of that resolution, the claim having accrued after April 13, 1861.

The *proviso* in that resolution was intended only to make an exception in favor of claims existing prior to April 13, 1861, which had been assigned or agreed to be assigned to loyal citizens of loyal States prior to April 1, 1861, in payment of debts incurred prior to March 1, 1861; it does not relate to claims *additional* to those mentioned in the preceding words of the resolution.

DEPARTMENT OF JUSTICE,

December 5, 1872.

SIR: Your letter of the 29th ultimo incloses a communication from the Second Comptroller of the Treasury, stating the facts relating to the claim of Messrs. McKnight and Richardson, assignees of Simeon Hart, to be paid for commissary supplies delivered to the Government at Albuquerque and Fort Stanton, New Mexico, in the month of May, 1861, and inquiring whether payment for the same is not prohibited by joint resolution, approved March 2, 1867, "prohibiting payment by any officer of the Government to any person not known to have been opposed to the rebellion and in favor of its suppression." (14 Stat., 571.)

From the statement of facts submitted, it appears that

Claim of the Assignees of Simeon Hart.

the stores mentioned were delivered on the 13th, 23d, and 26th of May, 1861, and a commissary's voucher was issued therefor, of the genuineness and sufficiency of which there is no question. That the payment of said voucher was withheld by the commissary in consequence of an order of the Secretary of War of the date of May 11, 1861, but that on the 28th of February last "payment of the flour delivered on the 13th, 23d, and 26th of May, 1861, amounting to the sum of \$30,675.68, was approved by the Secretary." That the payee of the voucher, Simeon Hart, resided and was domiciled in New Mexico at the time his claim accrued, but afterward engaged in a course of active disloyalty. That he was pardoned by the President in November, 1865, and that, before the approval aforesaid by the Secretary of War of his claim, he assigned it to Messrs. McKnight and Richardson, his creditors, loyal persons, &c.

The joint resolution is as follows: "That, until otherwise ordered, it shall be unlawful for any officer of the United States Government to pay any account, claim, or demand against said Government which accrued or existed prior to the 13th day of April, 1861, in favor of any person who promoted, encouraged, or in any manner sustained the late rebellion; or in favor of any person who, during said rebellion, was not known to be opposed thereto and distinctly in favor of its suppression; and no pardon heretofore granted, or hereafter to be granted, shall authorize the payment of such account, claim, or demand until this resolution is modified or repealed: *Provided*, That this resolution shall not be construed to prohibit the payment of claims founded upon contracts made by any of the Departments where such claims were assigned or contracted to be assigned prior to April 1, 1861, to creditors of said contractors, loyal citizens of loyal States, in payment of debts incurred prior to March 1, 1861."

In the communication of the Comptroller it is not stated by what part of the resolution the question as to the propriety of payment in this case is suggested, but it is presumed to be raised under the terms of the proviso. This proviso I do not understand as relating to claims additional to those mentioned in the preceding words of the resolution, but as intended only to make an exception in favor of the payment

Pension Agents and Agencies.

of such claims, accruing or existing prior to April 13, 1861, as had been assigned or agreed to be assigned to "loyal citizens of loyal States" prior to April 1, 1861, in payment of debts incurred prior to March 1, 1861; that is to say, an exception not intended to favor a disloyal claimant, but to protect the interests of loyal citizens, and of these only citizens of loyal States; enabling such a citizen to recover the debt due him that had been attempted to be paid by the assignment of a claim at a date prior to the commencement of active hostilities, when intercourse between the two sections of the country was yet lawful.

In this view the claim now in question, having accrued after April 13, 1861, is not within the prohibition of the resolution.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. GEO. S. BOUTWELL,

Secretary of the Treasury.

PENSION AGENTS AND AGENCIES.

The consolidation by the President, on the 23d of January, 1871, of the two pension-agencies previously existing in the city of New York was within the competency of the Executive, and a valid exercise of power. The authority given the President by the act of February 5, 1867, chap. 32, touching the establishment of pension-agencies and the appointment of pension-agents, may be exercised by him according to his judgment, subject only to the restrictions imposed by the two *provisoes* in that act.

DEPARTMENT OF JUSTICE,

December 6, 1872.

SIR: I have the honor to acknowledge the receipt of your letter of the 22d ultimo, in which you say :

"At the date of the passage of the act of February 5, 1867, (14 Stat., 391,) there were more than three agencies for the payment of pensions in the State of New York. On the 23d of October, 1871, the President, by an executive order, consolidated two of those agencies then established in the city of New York."

Upon this statement of facts, the following questions are submitted for my consideration and opinion :

"1st. Had the President the legal power to consolidate said agencies ?

Pension Agents and Agencies.

"2d. If he had, can he now revoke said order of consolidation, and thereby restore both of the same ?

"3d. If he had no legal power to make said consolidation, can he now revoke said order, and will such revocation operate as a restoration of said agencies?"

The act of February 5, 1867, (14 Stat., 391,) above referred to, is as follows: "That the President of the United States shall be, and he is hereby, authorized to establish agencies for the payment of pensions granted by the United States wherever, in his judgment, the public interests and the convenience of the pensioners require, and, by and with the advice and consent of the Senate, to appoint all pension-agents, who shall hold their offices for the term of four years, and until their successors shall have been appointed and qualified, and who shall give bonds, with good and sufficient sureties, for such amount and in such form as the Secretary of the Interior may approve: *Provided*, That the number of pension-agencies in any State or Territory shall in no case be increased hereafter so as to exceed three, and that no such agency shall be established, in addition to those now existing, in any State or Territory in which the whole amount of pensions paid during the fiscal year next preceding shall not have exceeded the sum of five hundred thousand dollars: *And provided further*, That the term of office of all pension-agents appointed since the first day of July, A. D. eighteen hundred and sixty-six, shall expire at the end of thirty days from the passage of this act, and the commissions of all other pension-agents now in office shall continue for four years from the passage of this act, unless such agents are sooner removed."

To answer the above questions it seems necessary to consider how the President could consolidate two agencies, or rather what the process of consolidation would be. The last proviso of the act in question, after providing for the removal of all pension-agents appointed between July 1, 1866, and the date of the act itself, enacts in relation to "all other pension-agents," namely, those appointed prior to July 1, 1866, that their commissions shall continue for a period of four years from the date of this act, "unless such agents are sooner removed." It leaves with the President the power to

Pension Agents and Agencies.

remove the class of agents referred to at any time during the four years, at the end of which their commissions would expire according to the terms of the proviso. The two pension-agencies in the city of New York were established by an arbitrary division, for convenience of the business in that city. A consolidation could only be made by the exercise of the power of removal by the President, and by the transfer of the business performed by the agent removed to the remaining agent. The power to effect this was clearly in the President, and your first question must be answered in the affirmative.

To revoke the order of consolidation would, perhaps, restore the division of business, but would not restore the agent removed to his former position; a re-appointment would be necessary to effect this.

The first proviso prohibits the increase of the number of agencies beyond three. You state that at the time of the consolidation there were more than three agencies in the State of New York. As long as this number of agencies continues, no appointment of an agent to take charge of business, severed, by revoking an order of consolidation, from the agency to which it had been transferred, can be made.

The last proviso did not extend for four years all *agencies* established prior to July 1, 1866, but only extended the term of office of *agents* appointed prior to that date. Upon the removal of one of these agents, therefore, if there were three other agencies, his agency would expire, and the business of such agency be transferred to some other.

Prior to the 23d of October, 1871, when the consolidation referred to took place, the four years mentioned in the act of February 5, 1867, during which the commissions of certain pension-agents were to continue, had expired; so that the authority conferred upon the President by the first clause of said act can be exercised according to his judgment, subject only to the limitations as to the number and amount expressed in the provisos of said act.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. C. DELANO,

Secretary of the Interior.

Case of Commodore R. H. Wyman.

CASE OF COMMODORE R. H. WYMAN.

The facts of this case showing that Commodore Wyman, at the time of the capture of the prize-steamer *Gertrude* by the United States steamer *Vanderbilt*, was "doing duty on board" the latter vessel within the contemplation of section 3 of the act of July 17, 1862, chap. 204, and was borne on the books thereof: *Held* that he is entitled to participate in the proceeds of the prize according to the rate of his pay in the service at that period.

DEPARTMENT OF JUSTICE,

December 7, 1872.

SIR: A communication was addressed to me on the 18th of September last, by Rear-Admiral Augustus L. Case, then Acting Secretary of the Navy, inclosing a written statement from Commodore R. H. Wyman, which presents the following case:

On the 5th of March, 1863, Commander (now Commodore) Wyman was ordered to the command of the United States steamer *Saint Iago de Cuba*, with instructions to report to Acting Rear-Admiral Wilkes, commanding the flying squadron whose flag was then hoisted on board the United States steamer *Vanderbilt*. Upon reporting to that officer, Commander Wyman was ordered by him to duty aboard the *Vanderbilt*, on his staff, until such time as he (the Commander) could be forwarded to the *Saint Iago de Cuba*. In April, 1863, while Commander Wyman was serving as a staff-officer of Acting Rear-Admiral Wilkes on board the *Vanderbilt*, the latter vessel captured the steamer *Gertrude*, which was subsequently condemned as prize. During this period the name of Commander Wyman was borne upon the books of the *Vanderbilt*, and he claimed to be entitled to a share of the proceeds of said prize by virtue of the provisions of the act of July 17, 1862, section 3, relating to the distribution of prize-money. (12 Stat., 606.)

The Acting Secretary observes in his communication that the statement of Commodore Wyman "is believed to be substantially correct as to his orders and service in the squadron under Acting Rear-Admiral Wilkes;" and my opinion is asked whether the claim of the Commodore is, under the circumstances, a valid one.

Case of Commodore R. H. Wyman.

It is understood that the particular provision of section 3 of the act of July 17, 1862, whereon this claim rests, is the following, which was in force at the time of the capture and condemnation of the prize referred to :

"Third. The share of the commanding officer of the fleet or squadron, if any, and the share of the commander of the ship, being deducted, the residue shall be distributed and apportioned among all others doing duty on board, and borne upon the books, according to their respective rates of pay in the service."

The validity of the claim depends simply upon the question whether Commander Wyman, at the time of the capture, was "doing duty on board" the steamer Vanderbilt, within the contemplation of the statute. If so, then (he having been also borne upon the books of that vessel) the requirements of the law are fully satisfied, and his right to a share of the proceeds of the prize, according to the rate of his pay in the service, is beyond controversy.

The only difficulty which has heretofore existed in connection with the case seems to have arisen out of the circumstance that, when he was ordered to duty on board the Vanderbilt by Acting Rear-Admiral Wilkes, the latter officer, though in actual command of that vessel, with his flag flying thereon, had previously assumed the command of the vessel, and made it his flag-ship, in disregard of orders of the Navy Department; and, in view of this circumstance, it was thought by one of my predecessors (see 11 Opin., 147) that Commander Wyman could not participate in the proceeds of the prize. But that opinion was given, as I find, upon a very meager and incomplete statement of the facts, and in the absence of material information now supplied.

I understand that, by the rules of the naval service, a junior officer, upon meeting with a senior in command, becomes subject to his orders for the time being, and must obey him; so that when, in obedience to his instructions, Commander Wyman reported to Acting Rear-Admiral Wilkes, and was ordered to duty on board the Vanderbilt, compliance with that order became obligatory upon him by the law of the service, and he was bound to perform the duty to which he was thus assigned so long as he remained under the com-

Carriage and Delivery of Letters.

mand of the acting rear-admiral. This has a very important bearing upon the matter in hand. If, by going aboard the Vanderbilt, and doing duty there, in compliance with the order of a senior officer under whose command he was placed, Commander Wyman did what the law of the service required him to do, it would be a contradiction to say that he was not lawfully doing duty on board that vessel.

Whether Acting Rear-Admiral Wilkes had or had not previously violated any instructions of the Department in making the Vanderbilt his flag-ship, could make no difference so far as Commander Wyman was concerned; since obedience by the latter to an order emanating from the former, apparently within the scope of his authority, was imperative under the circumstances.

Regarding the subject from this point of view, I am led to the conclusion that Commander Wyman was "doing duty on board" the capturing vessel within the meaning of the statute, and is entitled to share in the prize taken.

I have the honor to be, very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. GEO. M. ROBESON,
Secretary of the Navy.

CARRIAGE AND DELIVERY OF LETTERS.

The citizens of the city of Davenport, Iowa, are not prohibited by the act of June 8, 1872, chap. 335, from employing a private dispatch-company to carry and deliver, within the city limits, sealed letters on which no United States postage has been paid; it appearing that the free delivery of mail-matter has not been established there, and that, accordingly, the streets of the city are not post-routes.

DEPARTMENT OF JUSTICE,
December 18, 1872.

SIR: A letter of the Hon. J. W. Marshall, First Assistant Postmaster-General, acting as Postmaster-General, of the 4th instant, incloses one from the postmaster at Davenport, Iowa, asking the following question: "Would a city dispatch-company, organized and operated for the carriage and delivery

Carriage and Delivery of Letters.

of small packages from point to point within the city limits of Davenport, be allowed to carry and deliver also sealed letters on which no United States postage has been paid, provided such letters are left with the agents or at the depositories of the said dispatch-company, and there being at the time no free delivery of letters and no carriage of letters within the city by the Post-Office Department?"

The prohibitions in the act of June 8, 1872, chap. 335, commonly called the Postal Code, in relation to the carrying of mail-matter within the United States by private agency, relate to such carrying "over any post-route which is or may be established by land, or from any city, town, or place between which the mail is regularly carried," (sections 228, 229,) and even over these mail-matter may be carried "by private hands, without compensation, or by special messenger employed for the particular occasion only," (section 238.)

By authority of section 92 the Postmaster-General may provide "for the free delivery of mail-matter as frequently as the public convenience may require at every place containing a population of fifty thousand within the delivery of its post-office, and at such other places as the Postmaster-General may direct;" and section 205 declares all letter-carrier routes established in any city or town for the collection and delivery of mail-matter by carriers to be post-roads.

No free delivery of mail-matter being provided for the city of Davenport, and the streets of the city not being post-roads, the citizens are not prohibited from arranging with a private agency for the carriage and delivery of their mail-matter within the city, including sealed letters on which no United States postage has been paid, nor such agency from carrying and supplying the same.

The letter of the postmaster is herewith returned as requested.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. JNO. A. J. CRESWELL,

Postmaster-General.

Case of François A. Heinrich.

CASE OF FRANÇOIS A. HEINRICH.

By the 1st article of the convention of September 20, 1870, between the United States and the Austro-Hungarian monarchy, the right of an American citizen to change his nationality and become a citizen of Austria is recognized; but he must have had a residence of five years in that country, besides being naturalized there, before the United States are bound to consider him as such.

Quære, whether political duties or burdens, such as military service, might lawfully be imposed by Austria upon a person residing there who by birth is an American citizen, but who under the laws of that country (by having been born of Austrian parents only temporarily residing here) is also an Austrian citizen, without the consent of that person, or without his signifying by some act or declaration his will to be a citizen of that country.

If he has voluntarily assumed the character of an Austrian citizen, however, and has resided in Austria five years, it cannot be reasonably maintained by this Government that his Austrian citizenship, or the political obligations appertaining thereto, may be cast aside by him at pleasure, so long as he continues to reside within the jurisdiction of that country.

DEPARTMENT OF JUSTICE,
December 21, 1872.

SIR: I have the honor to acknowledge the receipt of your letter of the 6th instant, inclosing a copy of a communication from Baron Lederer of the 21st ultimo, and presenting for my consideration the following case:

One François A. Heinrich, now resident in Austria, was born in the city of New York, in 1850, of Austrian parents, who were then temporarily residing in that city, but who never became naturalized. The family returned to Austria when François was about two or three years old, taking him with them, and he has resided there since the return of his parents to that country. It is stated that at one time François obtained a passport as a citizen of the United States from the American consul at Stuttgart, in Würtemberg. It is also stated that in 1866 and 1867 he was furnished with Austrian passports, under the protection of which he traveled in the quality of an Austrian subject.

François is now called upon to render military service in Austria, but claims to be exempt therefrom on the ground that he is an American citizen, and he desires this Government to protect him in that claim. The Austrian government,

Case of François A. Heinrich.

however, denies that he is an American citizen, and insists that he must be considered an Austrian subject.

Upon the above state of facts, my opinion is requested as to whether the said François is a citizen of the United States and entitled to protection.

The 1st article of the convention of September 20, 1870, between the United States and the Austro-Hungarian monarchy reads as follows :

“Citizens of the Austro-Hungarian monarchy who have resided in the United States of America uninterruptedly at least five years, and during such residence have become naturalized citizens of the United States, shall be held by the government of Austria and Hungary to be American citizens, and shall be treated as such. *Reciprocally, citizens of the United States of America who have resided in the territories of the Austro-Hungarian monarchy uninterruptedly at least five years, and during such residence have become naturalized citizens of the Austro-Hungarian monarchy, shall be held by the United States to be citizens of the Austro-Hungarian monarchy, and shall be treated as such.* The declaration of an intention to become a citizen of the one or the other country has not, for either party, the effect of naturalization.”

As a general rule, a person born in this country, though of alien parents who have never been naturalized, is, under our law, deemed a citizen of the United States by reason of the place of his birth, (10 Opin., 321, 328, 329, and see also section 1 of the 14th amendment of the Constitution.) But by the article of the convention just quoted the right of an American citizen to change his national character and become a citizen of Austria is clearly recognized, but it is required that he shall have had a residence of five years in that country, besides being naturalized there, before the United States are bound to consider and to treat the person so naturalized as an Austrian citizen. In the case under consideration, therefore, though the said François is a native of this country, and as such was originally clothed with American nationality, yet he having resided in Austria uninterruptedly far beyond the period mentioned, the question submitted resolves itself practically into this inquiry, whether during that time he has acquired Austrian citizenship.

Case of François A. Heinrich.

It would seem, from the communication of Baron Lederer, that, under the law of Austria, a foreign-born child of Austrian parents takes the nationality of the latter, and is regarded as an Austrian citizen. Assuming this to be correct, and I am satisfied it is, a doubt might be suggested whether political duties or burdens, such as military service, could rightfully be imposed by that country upon a person who by birth is a citizen of this country, without his consent, or without his assuming the character of, or signifying by some act or declaration his will to be, a citizen of the former country. But the facts presented relieve the case before me of any difficulty of this sort. The circumstance that the said François has at different times obtained passports from the Austrian government and traveled under their protection as an Austrian subject, taken in connection with the length of time during which he has resided in Austria, may, I think, be viewed as a sufficient manifestation of consent on his part, at those periods especially, to be a member of that nation.

Now, there can be no question that such consent, co-operating with the law of Austria to which reference has been made, (by which, as it would seem, children of Austrian parents born abroad are naturalized at their birth,) and accompanied, moreover, by continued residence in that country, effected a complete change in his nationality from American citizenship to Austrian citizenship. Having once acquired the latter, it cannot reasonably be maintained that his Austrian nationality, or the political obligations appertaining thereto, may be cast aside by him at pleasure, so long as he continues to reside within the jurisdiction of Austria.

I have not overlooked the fact that François once obtained a passport from an American consul at Stuttgart. This is unimportant, except so far as it is indicative of a preference in regard to nationality; and I consider it overbalanced by the circumstances above adverted to, and the further circumstance that, from the return of his parents to Austria up to the present time, his domicile or residence appears to have remained in that country.

In view of all the facts and circumstances appearing in this case, I am of the opinion that, under the provisions of the aforesaid convention, François A. Heinrich should be

The Iowa Railway Land-Grant.

held by the United States to be an Austrian citizen, and treated as such—that he is not an American citizen, and, consequently, not entitled to protection from this Government.

I am, very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. HAMILTON FISH,
Secretary of State.

THE IOWA RAILWAY LAND-GRANT.

Consideration of the claims of the "Sioux City and Saint Paul Railroad Company" and the "McGregor and Missouri River Railroad Company," respectively, to the odd-numbered sections of lands at the intersection of their projected roads, under the act of March 12, 1864, chap. 84, granting lands to the State of Iowa, to aid in the construction of railways.

It was not the design of that act to authorize the issue of patents for lands lying beyond the point to which either of the roads mentioned, while in the process of construction, should by sections of ten consecutive miles be from time to time completed.

Priority of construction, and not priority of location, gives priority of right under the act; and hence the lands in controversy should be patented for the use of that company which shall first construct its road to the point of intersection with the projected road of the other company, though the latter may have been first located.

DEPARTMENT OF JUSTICE,

December 26, 1872.

SIR: I have the honor to acknowledge the receipt of your communication of the 2d instant, referring for my opinion the questions before you upon an appeal by the Sioux City and Saint Paul Railroad Company from a decision rendered by the Commissioner of the General Land-Office in favor of the McGregor and Missouri River Railroad Company, in a controversy between the two companies, in which both claim to be entitled to patents for certain lands which are covered by both the grants in the act approved May 12, 1864, entitled "An act for a grant of lands to the State of Iowa, to aid in the construction of a railroad in said State," (13 Stat., 72.)

By the 1st section of this act, Congress granted to the State of Iowa, for the purpose of aiding in the construction of a railroad from Sioux City to the south line of the State

The Iowa Railway Land-Grant.

of Minnesota, at a point therein to be selected by the State of Iowa, between the Big Sioux and the west fork of the Des Moines River, and also for the use and benefit of the McGregor Western (now the McGregor and Missouri) Railroad Company, for the purpose of aiding in the construction of a railroad from a point at or near the foot of Main street, South McGregor, in a westerly direction, on or near the forty-third parallel of north latitude, to intersect the road first mentioned in the county of O'Brien, in said State, every alternate section of land designated by odd numbers, for ten sections in width on each side of said road, and, in case any of these lands had been appropriated or disposed of, required the Secretary of the Interior to cause to be selected within twenty miles on each side from the lines of said roads so much land, in alternate odd-numbered sections, or parts of sections, as should be equal to the lands so disposed of or appropriated; all of the lands so granted to be *held by the State of Iowa for the uses and purposes aforesaid.*

The 4th section enacts as follows: "That the lands hereby granted shall be disposed of by said State for the purposes aforesaid only, and in manner following, namely: When the governor of said State shall certify to the Secretary of the Interior that any section of ten consecutive miles of either of said roads is completed in a good, substantial, workman-like manner, as a first-class railroad, then the Secretary of the Interior shall issue to the State patents for one hundred sections of land for the benefit of the road having completed the ten consecutive miles as aforesaid. When the governor of said State shall certify that another section of ten consecutive miles shall have been completed as aforesaid, then the Secretary of the Interior shall issue patents to said State in like manner, for a like number; and when certificates of the completion of additional sections of ten consecutive miles of either of said roads are, from time to time, made as aforesaid, additional sections of land shall be patented as aforesaid, until said roads or either of them are completed, when the whole of the lands hereby granted shall be patented to the State for the uses aforesaid, and none other: *Provided*, That if the said McGregor Western Railroad Company, or assigns, shall fail to complete at least twenty miles of its said road during each and every year from

The Iowa Railway Land-Grant.

the date of its acceptance of the grant provided for in this act, then the State may resume said grant, and so dispose of the same as to secure the completion of a road on said line, and upon such terms, within such time as the State shall determine: *Provided further*, That if the said roads are not completed within ten years from their several acceptances of this grant, the said lands hereby granted and not patented shall revert to the State of Iowa, for the purpose of securing the completion of the said roads within such time, not to exceed five years, and upon such terms as the State shall determine: *And provided further*, That said lands shall not in any manner be disposed of, or incumbered, except as the same are patented under the provisions of this act; and should the State fail to complete said road within five years after the ten years aforesaid, then the said lands undisposed of as aforesaid shall revert to the United States."

It will be observed that the two grants made by the act lap; that is, the western limit of the grant for the use of the McGregor and Missouri River Railroad Company is within the limits and covers a portion of the lands granted to aid in the construction of the road of the Sioux City and Saint Paul Company, and it is in relation to those lands that the controversy between the two companies has arisen. The Sioux City Company claims them because its road was first located; the McGregor Company claims them because it has constructed a sufficient number of miles of road to entitle it to patents for all the odd-numbered sections of public lands contained in its grant from the commencement of its road to the point of its intersection with the road of the other company.

By the statement of facts before me, I am not informed how much of the Sioux City and Saint Paul road has been completed, but infer that the road is not yet constructed far enough to touch the lands in question. It appears that the McGregor and Missouri River road is completed to Algona, a distance of one hundred and seventy miles, leaving eighty miles to be constructed between that place and the point of junction of the two roads.

In view of the provisions of the 4th section of the act, the claim of the McGregor and Missouri River Company to have patents issued to it for all of the lands designated to

The Iowa Railway Land-Grant.

aid in the construction of its road, while nearly one-third of the road is yet to be constructed, cannot, in my opinion, properly be allowed. It seems clear that it was not the intention of Congress to authorize the issue of patents for any of the lands lying beyond the point to which in the process of construction either of the roads should, by sections of ten consecutive miles, be from time to time completed, but, on the contrary, that the intention was that such lands should remain as security for further construction of the roads, and also as inducement to the railroad companies to push their work with vigor.

Certainly it was not contemplated that the grant for the benefit of either road should be exhausted while a large portion of such road should remain to be constructed; otherwise provision would not have been made in the 4th section of the act that, upon the completion of the roads, or either of them, the whole of the lands granted should be "patented to the State for the uses aforesaid, and none other," that is, that all remaining of the grant in aid of each road should be patented to the State for the use of the roads respectively; nor the further provision that on failure of the companies to complete the roads "within ten years from the date of their several acceptances of this grant, the lands not located shall revert to the State of Iowa, for the purpose of securing the completion of the road within such time, not to exceed five years, and upon such terms as the State shall determine;" nor the further provision that on the failure of the State to complete the roads within five years next after the expiration of the ten years allowed to the railroad companies, the lands undisposed of should revert to the United States.

Such careful provisions as to lands remaining unpatented on the completion of the roads, and then, upon the contingency of failure, first by the companies and then by the State, to complete the roads within the periods respectively allowed to them, would not have been made had it been intended that the whole of the lands granted should be conveyed to the railroad companies before their complete performance of the consideration upon which the grant is based.

But the McGregor Company, as appears in the statement of facts in the case, alleges that, at the time of the passage of

The Iowa Railway Land-Grant.

the act, the public lands in the eastern portion of Iowa had been mainly disposed of; that it was in view of this that the provision for the issue of patents to the State for *one hundred sections* of land upon the completion of each section of ten consecutive miles of road was adopted; and that, therefore, as public lands in sufficient quantities were not to be found within the prescribed limits along the eastern portion of the company's line, resort might be had from time to time to the lands beyond the completed portion of its road, to supply the deficiency.

We are not to look outside of the act for the intention of Congress, and base a construction of any of its provisions upon conjecture; but we are to consider all of its provisions, and by the light which they reflect are to arrive, if possible, at such a construction as will avoid contradiction or inconsistency; and it can hardly be supposed that, if Congress intended by the use of the words "*one hundred sections*," where they occur in the 4th section of the act, that the lands granted might be exhausted while the road was yet very far from being finished, three distinct provisions would have been added in the same section in direct conflict with such intention.

In this instance the real significance of the words in question can be ascertained from a fair and natural construction of the act, showing that they have not the importance which the company ascribes to them. The grant is made by the 1st section of the alternate odd-numbered sections for a width of ten sections on each side of the roads, and if any of these should not be available because a previous disposition had been made of them, then lands outside of that limit within twenty miles on each side are to be substituted. The 4th section refers to the lands so granted, and after prescribing the manner in which they shall be disposed of, as if the lands were all to be found within the ten-mile limits, or certainly within the twenty-mile limits, that is, one hundred sections for each section of ten consecutive miles of road continuous with such section, provides that for each such section of completed road that number of sections of land shall be patented; the words relied on by the company being used not in con-

The Iowa Railway Land-Grant.

tradiction to any other provision of the act, or as controlling words, but merely as words of course.

The claim of the Sioux City and Saint Paul Company to the lands in controversy because of priority of location of its road, which is in effect that they shall be held for its benefit until it shall have constructed its road along them, although the other company may first have constructed its road through them, is not, in my opinion, well founded. The grant is to the State, not to the railroad company. It is to the State for the use and benefit of the railroad companies, chartered by the State as its agencies to accomplish the purposes of the grant. The State is to take care that the lands are applied to the construction of first-class railroads between the points named in the act. Nothing but a naked trust is vested in the State until the completion of a section of ten consecutive miles of road, when the lands pertaining to that section are, upon a certificate of the governor to the Secretary of the Interior that such section "is completed in a good, substantial, and workman-like manner as a first-class railroad," to be patented to the State for the use of the company which has constructed the section. If the companies shall within the ten years following the date of their several acceptances of the grant fail to construct their respective roads, the State is allowed five years more for that purpose. If at the end of that time the roads shall not be completed, the lands revert to the United States, or so much of them as shall remain undisposed of under the provisions of the act; in other words, go back into the mass of public lands, discharged of all obligations created by the act, and thenceforth become subject to the general land-laws.

According to section 4, patents are to issue to the use of either company for one hundred sections of land, subject to the restriction heretofore stated, upon the presentation of the certificate of the governor as required by said section, and it is not perceived that the Secretary has any right to refuse such patents on the ground that the other company claims the land on account of the mere location of the road. When a railroad company locates its line under statutes similar to the one in question, ordinarily the lands designated for its use are withdrawn from market, and the right of the company attaches thereto, so as to exclude settlers and others

The Iowa Railway Land-Grant.

who may subsequently claim the lands; but as between these two roads, construction takes precedence of location. Priority of construction gives priority of right. Antecedent to this, the right or interest of the railroad companies in or to the lands is neither more nor less than the privilege of earning title to them by constructing roads. The State is the agent or trustee of the United States to effect the purposes of the act, and by its charters of the companies is responsible to them for the lands conveyed to it by the United States. In a similar case of a grant of lands to the Territory of Minnesota by act of June 29, 1854, (10 Stat., 302,) the Supreme Court decided that the grantee, as respects the United States, took only a "naked trust or power to dispose of the thing granted to the use and benefit of the grantor"—that is, "to dispose of the land and carry out the contemplated public improvements." (*Rice vs. Railroad Company*, 1 Black, 378, 379.)

From this view of the nature of the grant, it follows that the mere fact of location gives the companies no present right or interest in the lands beyond the privilege of earning them by the construction of their respective roads. Until the location of the roads, the grant, whatever its nature or extent, is a "float." (8 Opin., 244; 9 Wall., 89; *ibid.*, 95.)

Upon location of the road, it is ascertained what lands are subject to the grant, and then they are set apart to aid in the construction of the intended improvements in the manner and upon the terms specified in the act.

In connection with these views as to the proper construction of the act, the further consideration that the provision for patenting the lands upon the completion, from time to time, of sections of the road, and requiring that, upon the completion of either road, all of the lands remaining unpatented within the prescribed limits on each side shall be patented to the State "for the use aforesaid," that is, for the use of the company having completed such road, seems to be intended to create a rivalry between the two companies, and so promote the rapid construction of both roads and the opening at an early date of a continuous line between their initial points—this alone would lead me to the conclusion that the lands in dispute should be patented for the use of the company which shall

Appointments and Promotions in the Army.

first construct its road to the point at which it would be entitled to them, as being within the prescribed limits on each side.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. C. DELANO,

Secretary of the Interior.

APPOINTMENTS AND PROMOTIONS IN THE ARMY.

The claim of Major Absalom Baird to fill the vacancy in the Inspector-General's Department caused by the advancement of Lieutenant-Colonel Nelson H. Davis, under the act of June 8, 1872, chap. 351, is inadmissible; the authority to appoint conferred by that act being exhausted by the appointment of the last-named officer, and the filling of the vacancy, accordingly, being precluded by force of the 6th section of the act of March 3, 1869, chap. 124.

Review of the laws and regulations pertaining to appointments and promotions in the military service.

It may now be considered to be definitely settled, by the practice of the Government, that the *regulation and government* of the Army include, as being properly within their scope, the regulation of the appointment and promotion of officers therein.

Hence, as the Constitution expressly confers upon Congress authority "to make rules for the government and regulation of" the Army, that body may impose such restrictions and limitations upon the appointing power as it deems proper in regard to promotions or appointments to any and all vacancies in the Army, provided the restrictions and limitations be not incompatible with the exercise of the appointing power.

Previous to the act of July 28, 1866, chap. 299, the Secretary of War, with the approval of the President, might, by virtue of the act of April 24, 1816, chap. 69, at discretion, adopt alterations in the regulations for the Army; and the regulations thus modified had the sanction of Congress under the latter act, so far at least as they came not in conflict with the provisions of any later statute; but by the said act of 1866 this authority of the Executive to alter or modify was taken away.

Accordingly, the rules which existed at the date of the act of 1866 concerning the subject of appointment and promotion in the Army became, as it were, fixed; and, having the force of law, they must be taken to control the appointing power in regard to that subject until Congress shall otherwise direct.

DEPARTMENT OF JUSTICE,

January 9, 1873.

SIR: I have the honor to acknowledge the receipt of your communication of the 23d of October last, in relation to the

Appointments and Promotions in the Army.

claim of Major Absalom Baird, assistant inspector-general, to promotion to fill the vacancy occasioned by the recent advancement of Lieutenant-Colonel Nelson H. Davis to the rank of colonel and inspector-general, and also in relation to the laws and regulations concerning promotions and appointments in the Army, and their effect upon the appointing power.

The appointment of Nelson H. Davis to be inspector-general, with the rank of colonel, made under the authority given by the act of June 8, 1872, chap. 351, caused a vacancy in the Inspector-General's Department in the grade of lieutenant-colonel; and Major Baird, being the senior major in that Department, claims that he is entitled to promotion to fill that vacancy by virtue of the same act.

This claim is based upon what Major B. conceives to have been the design of Congress in passing that act, which was, as he expresses it, "to rectify, as far as possible, all the consequences" ensuing from the alleged non-observance of the rules respecting promotions, in the appointment of Colonel James A. Hardie to an inspector-generalship in March, 1864. But, however that may be, I think it very clear that the *authority to appoint*, conferred by the act of January 8, 1872, is limited to the making of but one appointment, namely, that of "Nelson H. Davis, of the Inspector-General's Department, to the rank and place therein" which the act describes, and does not extend to the making of any other appointment in that Department. That this appointment was intended to be restricted to the single appointment mentioned is not only manifest from the terms of the act, but is also indicated by its title. Thus the act is styled "An act to authorize *an* appointment," &c.

The result arrived at is, that, under the provisions of this statute, no power exists to appoint Major Baird to fill the vacancy caused by the advancement of Lieutenant-Colonel Davis, and the claim of the former must consequently be regarded as inadmissible. The 6th section of the act of March 3, 1869, (15 Stat., 318,) precludes the filling of the vacancy until authority so to do shall have been given by Congress.

With regard to the other branch of the subject of your communication, the principal question appears to be, whether

Appointments and Promotions in the Army.

the authority of the President, as to the making of promotions and appointments in the Army, may be restrained or limited by Congress.

Respecting promotions in the Army, I have been unable, after careful examination, to find a single instance where the power of Congress to prescribe the rule therefor has been even doubted. But in filling *original vacancies*, or offices in the Army newly created, the opinion was advanced by President Monroe, in a message to the Senate dated April 12, 1822, that "Congress had no right, under the Constitution, to impose any restraint by law on the power granted to the President, so as to prevent his making a free selection of proper persons for these offices from the whole body of his fellow-citizens." The Senate, however, disagreed with that opinion, maintaining that, as the Constitution conferred upon Congress power to "make rules for the government and regulation of" the Army, that body had a right to make any which it thought would benefit the public service, and to fix the rule both as to promotions and appointments in the Army. (See vol. 22, Niles's Reg., pp. 411 to 418; also, Story on Const., vol. 2, p. 339, note 3.)

Previous to the adoption of the Constitution, the appointment of company and regimental officers in the land forces of the United States was left to the States respectively, the General Government not being empowered by the Articles of Confederation to appoint those officers; and it is probable that in respect to them the system of appointment differed in the several States, and no uniform practice as to promotion then prevailed. Subsequent to the adoption of the Constitution, however, the subject of promotion in the Army was at an early period deemed by the executive department of the Government to be an appropriate one for regulation, and rules were accordingly prescribed by that department relative thereto. Thus we find the following order to have been issued by the Secretary of War, on the 26th of May, 1801, setting forth the rules then adopted by the President:

"Promotions in the Army of the United States shall hereafter be made agreeably to the regulations in force previous to those of the 3d of September, 1799, which were promulgated in general orders dated the 9th of that month.

Appointments and Promotions in the Army.

"Promotions to the rank of captain shall be made regimentally, and to the rank of major and lieutenant-colonel in the lines of the artillery and infantry respectively.

"The officer next in rank will, on the happening of a vacancy, be considered, in ordinary cases, as the proper person to fill the same; but this rule may be subject to exceptions in extraordinary cases."

The office of lieutenant-colonel was then the highest grade in the regiment.

When that order was issued, the subject to which it relates does not appear to have been so much as referred to by Congress, beyond a slight allusion contained in sections 6 and 8 of the act of March 3, 1799, (1 Stat., 752-754,) where it is provided that certain places designated therein should be "supplied by promotion or new appointment, or both, as may be requisite." The order, it would seem, embodies the general rules of promotion which were in force, with the tacit consent of Congress, prior to September 3, 1799, and which were doubtless those that were originally established, with the like consent, under our present form of government. On the 7th of March, 1808, the following was promulgated by the Department of War by way of supplement thereto:

"The above rules for promotion in the infantry and artillery are applicable to the cavalry and riflemen.

"No officer will consider himself as filling a vacancy until he receives notice thereof through the Department of War."

By the 5th section of the act of June 26, 1812, (2 Stat., 764,) it was provided that thereafter "promotions should be made, through the lines of artilleryists, light artillery, dragoons, and infantry, respectively, *according to established rule.*" This statute presents the earliest congressional action on the subject of promotion in the Army generally, and the rule therein referred to is obviously that which was established by the Executive in the regulations quoted above. The effect of the enactment was to give a legislative sanction to that rule.

The 5th section of the act of March 3, 1813, (2 Stat., 819,) made it the duty of the Secretary of War to prepare general regulations better defining and prescribing the respective duties and powers of the several officers of the staff departments, &c.,

Appointments and Promotions in the Army.

and to lay the same before Congress. In pursuance of this requirement, a body of regulations was prepared, approved by the Executive, and published on the 1st of May, 1813, which, by the terms of said section, were to be respected and obeyed until altered or revoked by authority of the President, and which contained, among other provisions, the following :

“ 1. Original vacancies will be supplied by selection ; accidental vacancies by seniority, except in extraordinary cases.

“ 2. Promotions to the rank of captain will be made regimentally ; to that of field-appointments by line ; the light artillery, dragoons, artillery, infantry, and riflemen being kept always distinct.”

Soon after these regulations were promulgated, Congress again acted directly upon the subject of promotion in the Army, and by the 12th section of the act of March 30, 1814, (3 Stat., 114,) provided that “ promotion may be made through the whole Army, in the several lines of light artillery, light dragoons, artillery, infantry, and riflemen, respectively,” repealing so much of the law of June 26, 1812, above cited, as came within the purview and meaning of the act. However, the enactment just quoted does not appear to have introduced any substantial changes or modification of the pre-existing rules on the subject.

By the 9th section of the act of April 24, 1816, (3 Stat., 298,) it was enacted “ that the regulations in force before the reduction of the Army (*i. e.*, the reduction under the act of March 3, 1815) be recognized as far as the same shall be found applicable to the service, subject, however, to such alterations as the Secretary of War may adopt, with the approbation of the President.”

The regulations in force at the period here indicated, and to which this provision applies, were the general regulations of May 1, 1813, which had been laid before Congress as required by the act of March 3, 1813, and from which an extract is given above. On referring to that extract, it will be observed that a distinction is there made between “ original vacancies ” and “ accidental vacancies ; ” the former being understood to comprehend only such vacancy as exists upon the creation of an office before the office is for the first time filled, and the latter to comprehend any vacancy happening

Appointments and Promotions in the Army.

by death, resignation, or otherwise, in an office previously established, and which had been once occupied. Original vacancies were to be supplied by selection; all other vacancies, except in extraordinary cases, by promotion according to the rule of seniority. This scheme was not confined to *promotions* in the Army merely; it extended to and embraced *appointments* therein generally; and the act of April 24, 1816, contains a legislative recognition of the rules relating to both, as laid down in those regulations.

Thus it would seem, from the course of the executive and legislative branches of the Government, that at this period they concurred in regarding the subject of appointment in the military service, equally with that of promotion therein, as a proper matter for regulation and for congressional action thereon. Indeed, Congress had at different times, from the beginning of the Government, prescribed rules for appointments in the staff of the Army. (See the *proviso* to section 3, act of April 30, 1790, 1 Stat., 120; also section 5, act of March 3, 1791, *ibid.*, 223; section 3, act of May 30, 1796, *ibid.*, 483; section 2, act of March 3, 1787, *ibid.*, 507, 8; section 1, act of May 22, 1798, *ibid.*, 557; sections 3 and 9, act of July, 16, 1798, *ibid.*, 601, 605; section 7, act of March 3, 1799, *ibid.*, 752; section 3, act of April 12, 1808, 2 Stat., 482; section 4, act of January 11, 1812, *ibid.*, 671; section 2, act of July, 1812, *ibid.*, 784, 785; section 9, act of March 1, 1813, *ibid.*, 819; sections 19 and 20, act of March 30, 1819, 3 Stat., 115.) To these citations may be added, as containing similar regulations, section 10 of the act of April 24, 1816, already mentioned.

Not long after the date of the last-named act a new issue of regulations was made, and these regulations, by the 14th section of the act of March 2, 1821, (3 Stat., 616,) were "approved and adopted for the government of the Army of the United States," &c. The regulations thus approved and adopted by Congress contained the following :

"1. The Executive will fill original vacancies, when created, by selection; *accidental* vacancies below the rank of brigadier-general by promotion and according to seniority, except in extraordinary cases.

"2. Promotions to commissions in the line below a cap-

Appointments and Promotions in the Army.

tainey will be made by regiments; to commissions between those of first lieutenant and brigadier-general, by corps; and no officer shall succeed to a higher rank until notified of his advancement thereto by the proper authority."

However, by an act approved May 7, 1822, (3 Stat., 686,) the 14th section of the act of March 2, 1821, cited above, was repealed; so that these regulations, which had previously received the sanction of the President, were now left by Congress under the operation of the act of April 24, 1816, by force of which they remained still recognized by that body, though subject to such alterations as the Secretary of War might adopt, with the approbation of the President.

Another issue of regulations was made in 1825, which retained, unaltered, the regulations of 1821, in regard to promotions and appointments in the Army, with the exception of the second paragraph of those regulations, in lieu of which the issue of 1825 contained the following:

"20. Promotions to commissions in the line below a majority will be made by regiments; to commissions between those of captain and brigadier-general by corps, keeping each line, as cavalry, artillery, &c., separate; and no officer shall succeed to a higher rank until notified of his advancement thereto by proper authority."

In 1836, revised regulations, having the sanction of the President, were issued. These contained the following provisions concerning the appointment and promotion of officers:

"1. Original vacancies will be supplied by selection.

"2. Accidental vacancies, to the rank of colonel, by promotion according to seniority, except in extraordinary cases.

"3. Promotions to the rank of captain will be made regimentally.

"4. Promotions to field-appointments, as major, lieutenant-colonel, and colonel, by line; the different arms, as artillery, infantry, cavalry, to be kept distinct.

"5. Appointments to the rank of brigadier-general, major-general, and all appointments on the staff from the line will be filled by selection," &c.

In 1841, and again in 1847, revised regulations, approved by the President, were also issued, but these revisions adopted

Appointments and Promotions in the Army.

without any change the regulations of 1836, as to appointment and promotion.

Another revision, sanctioned by the President, was issued in 1857, in which the rules respecting appointment and promotion were thus laid down:

"All vacancies in established regiments and corps, to the rank of colonel, shall be filled by promotion according to seniority, except in case of disability or other incompetency.

"20. Promotions to the rank of captain shall be made regimentally; to major and lieutenant-colonel and colonel, according to the arm, as infantry, artillery, &c; and in the staff departments, and in the engineers, topographical engineers, and ordnance, according to corps.

"21. Appointments to the rank of brigadier-general and major-general will be made by selection from the Army."

A new revision was subsequently issued, in 1861, and another and the last in 1863, in both of which the regulations of 1857, as to appointment and promotion, were adopted without modification.

Reference has already been made to the action of Congress on the subject of appointment and promotion in the Army, down to the year 1822. Since then, statutory provisions have been frequently enacted respecting the same subject. (See sections 4, 5, 7, and the proviso to section 9, act of July 5, 1838, 5 Stat., 257; section 7, act of June 18, 1846, 9 Stat., 18; sections 10 and 34, act of February 11, 1847, *ibid.*, 124, 126; section 2, act of March 3, 1847, *ibid.*, 184; section 4, act of March 2, 1849, *ibid.*, 351; act of September 26, 1850, chap. 70, *ibid.*, 469; section 1, act of March 3, 1851, *ibid.*, 618; section 9, act of March 3, 1853, 10 Stat., 219; section 3, act of August 3, 1861, 12 Stat., 287; section 1, act of August 6, 1861, *ibid.*, 317; section 4, act of April 16, 1862, *ibid.*, 379; first proviso to section 1, act of July 2, 1862, *ibid.*, 502; section 22, act of July 17, 1862, *ibid.*, 597; proviso to section 11, act of July 17, 1862, *ibid.*, 599; sections 3, 4, 13, 17, 18, and 23, among others in the act of July 28, 1866, 14 Stat., 332, *et seq.*)

And furthermore, by the 37th section of the act last cited, (14 Stat., 337, 338,) the then existing Army Regulations were

Appointments and Promotions in the Army.

"to remain in force" until future action on the part of Congress.

From this review of the action of the Executive and of the Legislature in regard to the promotion and appointment of officers to fill vacancies, whether original or accidental, in the Army, it will be seen that both these departments of the Government have not only deemed the subject to be a proper one for regulation, but have considered such regulation as appropriately belonging to a system of regulations designed for the government of the military service. It may, therefore, be regarded as definitely settled by the practice of the Government, that the regulation and government of the Army include, as being properly within their scope, the regulation of the appointment and promotion of officers therein. And as the Constitution expressly confers upon Congress authority "to make rules for the government and regulation of" the Army, it follows that that body may, by virtue of this authority, impose such restrictions and limitations upon the appointing power as it deems proper in regard to making promotions or appointments to fill any and all vacancies of whatever kind occurring in the Army, provided, of course, that the restrictions and limitations be not inconsistent or incompatible with the exercise of the appointing power by the department of the Government to which that power constitutionally belongs.

Recurring to the act of May 7, 1822, cited above, it has been already remarked that after the repeal by that act of the 14th section of the act of March 2, 1821, approving and adopting the new issue of regulations previously made, these regulations remained under the operation of the act of April 24, 1816, and that by virtue of the latter statute they continued to have a legislative recognition, subject to any alterations the Secretary of War might adopt, with the approbation of the President. Thus it was left discretionary with the Executive to modify those regulations from time to time, which he subsequently did; and the regulations so modified undoubtedly had the sanction of Congress under the act of April 24, 1816, so far at least as they came not in conflict with the provisions of any later statute. In case of conflict to any extent, to that extent the regulations had no force, and the statute prevailed. But by the recent act of 1866,

Western Union Telegraph Company.

which provides that the then existing regulations shall "remain in force" until further action by Congress, the authority to modify them previously possessed by the Executive would seem to have been taken away.

Accordingly, the rules which then existed concerning the subject of appointment and promotion in the Army, thus becoming, as it were, fixed, and having as they do the force of law, must now be taken to control the appointing power in regard to that subject until otherwise ordained by Congress.

I have the honor to be, very respectfully,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,

Secretary of War.

WESTERN UNION TELEGRAPH COMPANY.

The papers submitted disclosing the fact that the line of telegraph operated by the Western Union Telegraph Company along the route of the Union Pacific Railroad and of the Central Pacific Railroad, from Omaha to San Francisco, is a different line from that originally built and equipped between the same termini by the Union Pacific Railroad Company and the Central Pacific Railroad Company, under the act of July 1, 1862, chap. 120: *Held* that the line operated by the Western Union Telegraph Company is not subject to the provisions of that act and of its supplements, requiring one-half the compensation for services rendered the Government over the telegraph-lines established thereunder to be applied to the payment of the bonds issued by the United States in aid of the construction thereof, and that no portion of the compensation allowable for the transmission of Government dispatches over the said line can be retained for payment of the bonds mentioned.

Respecting the telegraph-line operated by the Western Union Telegraph Company along the route of the Kansas Pacific Railroad, the Attorney-General declines to express an opinion without more specific information.

DEPARTMENT OF JUSTICE,

January 16, 1873.

SIR: I have examined the papers which accompanied your letter to me of the 30th of November last, relative to the subject of compensation for services rendered by the Western Union Telegraph Company in transmitting Government dis-

Western Union Telegraph Company.

patches over the lines operated by that company along the routes of the Kansas Pacific Railroad, the Union Pacific Railroad, and the Central Pacific Railroad.

The question on which you desire my opinion I understand to be, whether one-half of the compensation chargeable for the transmission of Government dispatches over the telegraph-lines mentioned should be retained and applied to the payment of the bonds issued by the United States in aid of the construction of said roads.

This question has, it seems, arisen in connection with certain provisions of the act of July 1, 1862, of the amendatory act of July 2, 1864, and also of the 9th section of the act of March 3, 1871, (12 Stat., 489; 13 Stat., 356; 16 Stat., 525,) which are supposed to have a bearing upon claims presented by the Western Union Telegraph Company for payment for services rendered as aforesaid.

By the act of July, 1862, grants were made to the Kansas Pacific Railroad Company, the Union Pacific Railroad Company, and the Central Pacific Railroad Company, to aid each company in building and equipping not only its road, but a telegraph along the line of its road, the object being to promote telegraphic as well as railroad communication from the Missouri River to the Pacific Ocean. These companies were each required to construct both a road and a telegraph; yet they had authority to make arrangements with certain telegraph companies, then existing, for the removal or transfer upon or along the line of their roads, as fast as the same were built, of the telegraph already established between the Missouri River and San Francisco, and such transfer was to be considered a fulfillment on the part of said railroad companies of the provisions of the act in regard to the required construction by them of a telegraph along their roads. And in case of disagreement between the said telegraph companies and the said railroad companies, the former were authorized to remove their telegraphs upon and along the line of the contemplated roads without prejudice to the rights of the latter.

The grants referred to were made upon the condition that the grantees, the said railroad companies, should, among other things, keep their roads and telegraphic lines in repair and use, and at all times transmit dispatches over their lines

Western Union Telegraph Company.

&c., whenever required so to do by any Department of the Government; that the Government should, at all times, have the preference in the use of their lines; and that all compensation for services rendered for the Government should be applied to the payment of the bonds alluded to above. The amendatory act of July 2, 1864, however, provided that only one-half of the compensation for services thus rendered should be applied to such payment. Section 9 of the act of March 3, 1871, merely directs the Secretary of the Treasury to pay over to the Pacific Railroad Companies mentioned in the act of 1864, and performing services for the United States, one-half of the compensation at the rate provided by law for such services, &c.

With regard to the line of telegraph operated by the Western Union Telegraph Company along the routes of the Union Pacific Railroad and the Central Pacific Railroad, extending from Omaha to San Francisco, the papers submitted disclose the fact that this is a different line from that originally built and equipped between the same termini by the Union Pacific Railroad Company and the Central Pacific Railroad Company under the act of 1862.

The Central Pacific Company, as it seems, constructed a line of telegraph the entire length of its road from San Francisco to Ogden, and the Union Pacific Company constructed a line of telegraph the entire length of its road from Ogden to Omaha, both of which lines were completed in accordance with the statutes cited, and were accepted by the United States in the same manner as were the roads of those companies. On the other hand, the line operated by the Western Union Telegraph Company between San Francisco and Sacramento was originally built by the California State Telegraph Company, and transferred to the former company, by which it was removed to the location of the road constructed by the Central Pacific Company, without any arrangement being made with that company, and in exercise of the right of removal thereto secured by the act of 1862; while the line operated by the Western Union Telegraph Company between Sacramento and Ogden is a new line erected by this company on the location of the Central Pacific Railroad. Thus between San Francisco and Ogden there appears to be

Western Union Telegraph Company.

two telegraphic lines established on the route of the Central Pacific Railroad, viz, the one which was constructed by the Central Pacific Railroad Company, and the one which was formed by the removal and erection of lines by the Western Union Telegraph Company as aforesaid ; and it is understood that these two lines are now worked in competition with each other.

Respecting the line operated by the Western Union Telegraph Company, between Ogden and Omaha, I gather from the papers that it was originally erected under provisions of law distinct from those already mentioned, and was afterward purchased by that company and removed onto the location of the Union Pacific Railroad ; so that along the route of this road there are also established two lines of telegraph, viz, that constructed by the Union Pacific Railroad Company, and that purchased and removed there by the Western Union Telegraph Company ; and these, as I understand, are likewise competing lines.

Assuming the correctness of the information contained in the papers transmitted to me, according to which the line of telegraph operated by the Western Union Telegraph Company between Omaha and San Francisco, though established on the location and route of the Union Pacific and Central Pacific railroads, is a different line altogether from that constructed by the Union Pacific Railroad Company and the Central Pacific Railroad Company between the same points and on the same location and route, I am of the opinion that the provisions of the acts of 1862, 1864, and 1871, hereinbefore adverted to, do not authorize one-half or any portion of the compensation allowable for the transmission of Government dispatches over the former line to be retained and applied to the payment of the above-mentioned bonds. Whatever may be the effect of those provisions in regard to compensation for sending Government messages over the telegraphic lines constructed by the two Pacific Railroad Companies just referred to, whether such lines are worked or managed by the companies themselves or by others, it is very clear to my mind that they do not extend to the compensation for similar services rendered by any telegraph line, with the erection or establishment of which

Attorney-General.

along the route of their roads those companies had nothing to do.

As to the line of telegraph operated by the Western Union Telegraph Company along the route of the Kansas Pacific Railroad Company, it appears from the papers that this line was built by the latter company, but under some arrangement, the particulars of which are not furnished, the former company has the working and control of the line. Before expressing any opinion upon the question submitted in so far as it relates to this branch of the case, I desire to be put in possession of more specific information touching that arrangement. Such information, I think, is necessary to a full and proper understanding of the matter, without which correct conclusions thereon cannot well be reached.

The papers received with your letter are herewith returned.

I have the honor to be, very respectfully,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,
Secretary of War.

ATTORNEY-GENERAL.

Where, at the solicitation of a committee of the Senate, an opinion from the Attorney-General was requested by the Acting Secretary of the Interior, upon a matter which had been previously submitted by the latter to Congress, and which was then under the consideration of said committee, for whose information solely the opinion was desired: *Held* that the Attorney-General is not authorized to give his official opinion in such case, the request being virtually an application from the committee for counsel in a matter of legislation.

The decisions of former Attorneys-General, to the effect that it is not the duty of the Attorney-General to advise either House of Congress, or any committee thereof, upon any matter pending before the same, cited and affirmed.

DEPARTMENT OF JUSTICE,
January 20, 1873.

SIR: I have the honor to acknowledge the receipt of your letter of the 18th instant, in which, after stating you had submitted to Congress your construction of the 11th section of the Choctaw and Chickasaw treaty, (14 Stat., 169,) to the

Attorney-General.

effect that the United States were bound to pay a certain balance on certain Arkansas and Texas bonds held in trust by the Department of the Interior for the benefit of said Indians, amounting to the sum of \$297,890,²/₁₀₀, and that you had asked of Congress an appropriation therefor, you say that the Committee on Indian Affairs in the Senate had unanimously agreed to your views, and had asked you to submit the matter to me for my opinion, that they might go before the Senate still further fortified to ask for the appropriation in question.

I have carefully considered the subject-matter of your communication, and am reluctantly brought to the conclusion that I ought not to give an official opinion for the purposes indicated in your letter. Several of my predecessors have decided, and on three different occasions I have affirmed their views, that the Attorney-General was not authorized to give his official opinion upon a call of either House of Congress or any committee thereof, as to any matter pending before Congress. (See 1 Opin., 253, 335, 492; 2 Opin., 499; 10 Opin., 164; and 12 Opin., 544.) And it appears to me that your request is within the spirit if not within the letter of these decisions.

According to the law creating the office of Attorney-General, he is authorized to give his advice and opinion upon questions of law, when requested by the heads of any of the Departments, touching any matters that may be before their Departments; and it might be objected, if my opinions were given to be used to fortify a position taken by a committee of the Senate as to an appropriation of money, that I was improperly interfering with the legislative affairs of the country.

I fully recognize the right of the head of any of the Departments to call upon me for an official opinion in respect to any question of law pending before the Department by whose head the call is made, and I consider it my duty promptly to respond to such a call; but I cannot recognize the right of any committee of Congress to call for such an opinion for their use in matters of legislation; and if given for that purpose, it would be entitled to no more consideration in Congress

Remission of Forfeitures by the Postmaster-General.

than the opinion of any other individual presumed to have a knowledge of legal matters.

I beg, therefore, to be excused for declining to give an opinion upon the question submitted in your communication, as I regard it as an application from a committee of the Senate, and not from the head of a Department, and as my authority to give such opinions is confined by the law to matters which concern some departmental action of the Government.

Very respectfully,

GEO. H. WILLIAMS.

Hon. B. R. COWEN,

Acting Secretary of the Interior.

REMISSION OF FORFEITURES BY THE POSTMASTER-GENERAL.

The provisions of the 8th section of the act of June 8, 1872, chap. 335, clearly imply the existence of authority in the Postmaster-General to remit a forfeiture or deduction arising out of a contract for the transportation of the mail; the language of the 266th section of the same act also implies a discretion in that officer to make a deduction or not from the pay of mail-contractors for failure to perform service according to contract; and by the 316th section of the same act the Auditor for the Post-Office Department may mitigate or remit any fine, penalty, or forfeiture arising out of the operations or business of the postal service, with the written consent of the Postmaster-General.

Where the agreement with a mail-contractor contains the usual stipulation that "in all cases there is to be a forfeiture of the pay of a trip when the trip is not run," &c.: *Held*, in view of the above provisions, that it is competent to the Postmaster-General to waive the forfeiture thereby provided for, in any case arising upon the agreement, according as it may seem to him just and proper to do so under the particular circumstances of the case.

DEPARTMENT OF JUSTICE,

January 29, 1873.

SIR: I have the honor to acknowledge the receipt of your letter of the 16th instant, in which you say that in almost every section of the country the mail-service was much interrupted during the prevalence of the late horse-epidemic; that numerous applications have been made by contractors for remission of the penalty which was imposed for non-performance of service; and that you are in doubt whether, in view of the express stipulation in the contract that there is

Remission of Forfeitures by the Postmaster-General.

in all cases to be a forfeiture of the pay for a trip when the trip is not run, it would be competent for you to make an exception for any cause. And my opinion is asked upon the question, whether you are to be governed by the stipulation in the contract, or may exercise the discretion apparently conferred upon you by the language of section 266 of the act of June 8, 1872.

The stipulation in the contract to which you refer reads as follows: "It is hereby also stipulated and agreed by said contractor and his sureties, that in all cases there is to be a forfeiture of the pay of a trip when the trip is not run, and of not more than three times the pay of the trip when the trip is not run and no sufficient excuse for the failure is furnished."

Various sections of the said act of 1872, it seems to me, bear upon the question. Section 8 provides for a report by the Postmaster-General to Congress, in which he is required to state what fines have been imposed upon, and deductions made from the pay of, contractors during the preceding year, and whether the fine or deduction has been *remitted*, and for what reason. This clearly implies a right in the Postmaster-General to remit a fine or deduction arising out of a contract for the transportation of the mail.

Section 266, to which you refer, provides that the Postmaster-General may make deductions from the pay of contractors for failure to perform service according to contract, and impose fines upon them for other delinquencies. He may deduct the price of the trip in all cases when the trip is not performed, not exceeding three times the price, if the failure be occasioned by the fault of the contractor or carrier. Permission is here given to the Postmaster-General to make deductions from the quarterly payment to contractors for the failure to perform a trip, and the language implies a discretion to make a deduction or not, according to the judgment of the Postmaster-General.

Section 316 of the same act expressly provides that the Auditor for the Post-Office Department may mitigate or remit any fine, penalty, or forfeiture arising in relation to the officers, employes, operations, or business of the postal service, with the written consent of the Postmaster-General.

The Chehalis Indian Reservation.

And I conclude, therefore, that it is within your discretion to make deductions or not from the pay of contractors, according to what may appear to be right and proper under the circumstances of each case.

Parties to contracts generally have the right to waive any claim which they have thereunder, and I think that the law confers upon you the power to waive on the part of the United States, if you see proper to do so, any claim which they may have under the stipulation in the contract upon which the doubts suggested by you have arisen.

Very respectfully,

GEO. H. WILLIAMS.

Hon. JNO. A. J. CRESWELL,
Postmaster-General.

THE CHEHALIS INDIAN RESERVATION.

In the absence of authority conferred either by treaty or by statutory provision, it is not competent to the Secretary of the Interior to set apart any portion of the public domain for the purpose of an Indian reservation.

DEPARTMENT OF JUSTICE,
February 8, 1873.

SIR: I have the honor to acknowledge the receipt of your letter of the 4th instant, inclosing a communication from H. R. Clum, esq., Acting Commissioner of Indian Affairs, dated the 1st instant, together with copies of an official correspondence in relation to the Chehalis reservation in Washington Territory.

Referring to suggestions made by the Acting Commissioner in his communication, you request my opinion on the question, "whether the action of this [the Interior] Department, as contained in the correspondence referred to, is sufficient to legally establish the said Indian reservation."

Without restating here the action of your Department in this matter, I may observe, in reply to your request, that I have given the subject proposed a careful examination, and that the results of this examination lead me to doubt the sufficiency of that action to establish the reservation mentioned. I have not been able to find any treaty provision or

The Chehalis Indian Reservation.

any statutory provision under which the Secretary of the Interior is authorized to make such reservation, or to set apart a certain portion of the public domain for that purpose, and, in the absence of authority thus derived, the power of the Secretary to do so, I think, does not exist.

Reservations of this character have generally been made through the exercise of the treaty-making power, and in fulfillment of treaty obligations; but Congress has at times expressly granted authority to establish them, where it was not already conferred by existing treaties. After adverting to the failure of certain treaties which had previously been negotiated with the Indian tribes resident in California and Oregon, the Secretary of the Interior, in his annual report to the President, in December, 1852, observes: "If the Indians are to be removed out of California and Oregon, it will be for Congress to say so, and to provide for them some place of refuge. Or, if any particular districts of country within their limits, more remote from the settlements of the whites, are to be set apart for them, it is proper that Congress, which is alone invested with the power of disposing of the public domain, should make the necessary provisions on the subject." (See, also, the annual message of President Fillmore, of December 6, 1852.) This was followed by action on the part of Congress, in the act of March 3, 1853, (10 Stat., 238,) expressly authorizing the President "to make five military reservations from the public domain, in the State of California, etc., for *Indian purposes*." And see section 2, act of April 8, 1864, (13 Stat., 40.)

This legislation manifestly proceeds on the idea that, except in pursuance of authority given by statute or by treaty, the Executive Department of the Government cannot thus appropriate the public domain; a view which, as it would seem, coincides with the opinion then entertained by that Department.

It may be proper to add, in this connection, that, while the authority of the Executive to reserve portions of the public lands for public uses, such as forts, magazines, arsenals, dock-yards, &c., is recognized by Congress, this authority as to such reservations in Oregon and in Washington Territory is placed under restrictions. (See section 14, act September 27,

Case of David Quinn—Compromise of Claim.

1850, 9 Stat., 500, and section 9, act of February 14, 1853, 10 Stat., 159.) Those restrictions in terms apply to *all reservations* which *the President* is authorized to there make for public uses; and as it is plain that they are inapplicable to Indian reservations, it seems to follow that, in the view of Congress, reservations of the latter description are not within the authority of the President to make. But even if this were not a legitimate inference from the provision referred to, the latter at least indicates that Congress intended, so far as Washington Territory and Oregon are concerned, to keep the creation of such reservations under legislative control.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. C. DELANO,

Secretary of the Interior.

CASE OF DAVID QUINN—COMPROMISE OF CLAIM.

The Secretary of War is not authorized to pay the claimant in this case anything in compromise of damages alleged to have been sustained by him in connection with his contract of August 10, 1867, for removing rock at the entrance of Eagle Harbor, Michigan; the authority of the former being restricted to paying for work actually performed by the latter.

DEPARTMENT OF JUSTICE,

February 8, 1873.

SIR: I have the honor to acknowledge the receipt of your letter of January 24, 1873, inclosing a letter from David Quinn, dated Washington, D. C., January 15, 1873, offering to accept \$25,000 in full satisfaction of a claim for work done at Eagle Harbor, Lake Superior, now pending in the Court of Claims.

You request that the evidence on both sides be examined, and an opinion furnished, "Whether the Department, in the light of the evidence filed, would be justified in accepting the proposition of Mr. Quinn, and also whether such action can be legally taken."

I am of the opinion that the War Department has no power to pay a sum in compromise of any damages alleged to have been suffered by Mr. Quinn under his contract of August

Case of David Quinn—Compromise of Claim.

10, 1867; the authority of your Department being restricted to payment for the work actually performed, and the amount of such payment being limited by the appropriation for the improvement upon which the work was performed.

Under the provisions of the contract referred to, Mr. Quinn was to have finished his work on or before the 1st of October, 1868. It was not completed at that date, and Mr. Quinn applied to the Engineer Department for an extension of time, which was refused. It appears from the evidence that the work had been delayed by his own default, owing to the failure of experiments made by him, because of the want of suitable materials, and from other causes, for which he and not the Government is chargeable.

His contract provided, *inter alia*, "That the said David Quinn, of Chicago, Illinois, shall remove the rock at the entrance of the harbor at Eagle Harbor, Michigan, and deposit it at such point as the engineer in charge may direct; the said David Quinn furnishing all labor, boats, machinery, and appliances of every description necessary to remove the rock, so as to obtain a depth of not less than fourteen feet at low water, in conformity with the terms proposed in the advertisement inviting proposals for the improvement of Eagle Harbor, Lake Superior." For the removal of the rock named, the said Brevet Colonel J. B. Wheeler, major of engineers, agreed to pay fifty-eight dollars per cubic yard.

It appears from the testimony in the case that Mr. Quinn has been paid for all rock removed by him, and that the amount so removed was but 217 cubic yards. The advertisements for proposals stated that there were about "eighteen hundred and three (1,803) cubic yards of trap-rock to be removed," so that the small relative amount actually taken out is in itself an evidence of a want of diligence on the part of the contractor.

In addition to the rock removed, however, there was an additional amount of preparatory work by drilling, and for this Mr. Quinn was entitled to compensation.

In a report addressed to Major-General A. A. Humphries, Chief of Engineers, dated December 24, 1868, by J. B. Wheeler, major of engineers and brevet colonel, who executed the contract with Mr. Quinn, the following appears :

Case of David Quinn—Compromise of Claim.

"In November I sent Mr. Bacon to Eagle Harbor to measure up the work done, and, under date of November 19, he reports 197 cubic yards of loose rock and gravel and 20 cubic yards of broken rock removed; in all, 217 cubic yards; also from 400 to 450 holes drilled, which, allowing the average depth of 4 feet each, would give 1,800 feet of drilling done. The drilling can be done for one dollar and twenty-five cents per foot. Allowing him this liberal estimate, Mr. Bacon thinks that he has been paid in full for what he has done, in which I agree.

"The 217 cubic yards, at \$58, would amount to... \$12, 556 00

"The 1,800 feet of drilling, at \$1.25, would
amount to 2, 250 00

"Total 14, 806 00

"Mr. Quinn has received 90 per cent. of his contract-price on 300 cubic yards, or \$15,660, these payments being made, respectively, on May 13, July 24, and September 10, 1868, on estimates of Mr. Bacon."

In the report of "Henry Bacon, assistant," referred to above, and dated December 7, 1868, he says: "There are perhaps 400 to 450 holes drilled, averaging not over four feet each, or 1,800 feet. The highest estimate of the cost of such drilling is \$1.25 per foot. Very many of these holes will be found useful in the progress of the work."

I do not regard the mere cost of drilling as the standard of compensation to the contractor for the preparatory work. He should be paid, subject to the limit of the appropriation, for the value of this work to the Government; which value should be ascertained by comparing the preparatory work in amount and importance with the work completed, reference being had to the contract-price, and by an estimate of the usefulness and effect of it in the subsequent progress of the work. In the present incomplete state of the evidence I am unable to estimate what the value of this preparatory work has been.

In conclusion, I would say, in answer to your inquiry, that in the light of the evidence filed, "your Department would not be justified in accepting this proposition of Mr. Quinn." You

Letter-Postage.

are not authorized to make any payment to him except for work actually performed. His contract provided for the payment to him of fifty-eight dollars per cubic yard for the removal of rock. He has been paid for all the rock which he removed, and the evidence in the case does not show that the preparatory work which he did amounted in value, and in excess of the sum paid him for it, to \$25,000, the amount which he offers to receive in settlement of his claim.

Very respectfully,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,
Secretary of War.

LETTER-POSTAGE.

Letters on which postage has not been fully prepaid at the time of mailing them should be charged at the office of delivery only with the amount of the deficiency.

Meaning of the words "one full rate of postage," and also of the words "unpaid rate," as employed in section 151 of the act of June 8, 1872, chap. 335, explained.

That section only applies when mail-matter is deposited in the post-office, chargeable with two or more rates, one of which, at least, has been paid; and in regard to such matter both the paid and the unpaid rates are governed by the same standard.

DEPARTMENT OF JUSTICE,
February 9, 1873.

SIR: I have the honor to acknowledge the receipt of your letter of the 31st ultimo, calling my attention to certain sections of the "act to revise, consolidate, and amend the statutes relating to the Post-Office Department," chap. 335, pamphlet laws, 1872, and also to an act approved January 9, 1873, amendatory of section 133 of said act, and with reference thereto presenting for my consideration the following question: "Should letters not fully prepaid be charged at the office of delivery with double the deficient postage, or only with the balance not prepaid?"

The answer to this question depends upon the meaning of sections 150, 151, and 152 of said act.

Section 150 provides, "That postage on all mail-matter

Letter-Postage.

must be prepaid by stamps at the time of mailing, unless herein otherwise provided for.

Exceptions are made by several of the subsequent sections of the act; but it is only necessary to notice the partial exception made in section 151, as follows:

“That all mail-matter deposited for mailing, on which at least one full rate of postage has been paid, as required by law, shall be forwarded to its destination charged with the unpaid rate, to be collected on delivery.”

Section 152 provides, “That if any mail-matter, on which, by law, the postage is required to be prepaid at the mailing-office, shall by *inadvertence* reach its destination without such prepayment, *double* the prepaid rates shall be charged, and collected on delivery.”

Let it be noticed, in the first place, that the *rate* of postage chargeable on all letters for their transmission through the mail is fixed by section 156 of the same act at “three cents for each half ounce or fraction thereof.” With respect to this description of mail-matter, then, the phrase “one full rate of postage,” used in section 151, means simply the amount of postage required to be paid for a half ounce of such matter, viz, three cents. So that the latter section applies whenever a letter exceeding a half ounce in weight, on which at least three cents postage (one full rate) has been paid, is deposited in the post-office for mailing. In such case, though full postage, or the amount chargeable under the provisions of section 156, may not have been paid on the letter, yet it is the duty of the postmaster at the mailing-office to forward the same to its destination, “charged with the unpaid rate,” &c.

The inquiry here arises, What is meant by the words “unpaid rate?” I understand these words, as employed in section 151, to signify such rate (or rates) of postage as had not been paid on the letter or other matter at the time of mailing it, and with which it was then chargeable by law, in addition to the rate (or rates) of postage that had been paid thereon. Thus, if a letter weighing an ounce, on which but one rate (three cents) was paid, were deposited for mailing, inasmuch as a letter of that weight is chargeable, under the provisions of section 156, with two rates, (six cents,) the unpaid rate on

Letter-Postage.

the letter so deposited would be three cents; a sum which, with the rate already paid, would make up the full amount of postage authorized to be charged at the mailing-office. And if, in the case just put, the letter weighed a fraction over an ounce but not exceeding an ounce and a half, and only one rate had been paid thereon, the unpaid rate would amount to six cents, and so on; the unpaid rate in each instance depending upon the weight of the letter and the number of rates (not amounting to full postage) already paid on it when deposited for mailing.

Section 151 only takes effect when mail-matter is deposited in the post-office chargeable with two or more rates, one of which, *at least*, has been paid; and in regard to such matter, both the paid and the unpaid rates are, as I conceive, governed by the same standard. The rate unpaid, mentioned in that section, corresponds in amount with the rate paid, referred to in the same section, in the proportion that the weight for which the former is chargeable corresponds with the weight covered by the latter, both rates in the case of letters being determinable by the provisions of section 156.

This interpretation of section 151 derives support from the language employed in section 152, and is, I think, consistent with the other statutory provisions adverted to in your communication. Section 152 declares that, in the case to which it applies, "*double* the prepaid rates shall be charged and collected on delivery." The presence of a term in this section descriptive of the increased postage to be charged and collected in the case there mentioned, and the absence of any term of like character in section 151, afford ground for the inference that no increase of postage in the case provided for by the latter section was intended by Congress to be charged or collected.

In answer, then, to the question presented by you, I have to say that, in my opinion, letters not fully prepaid at the time of mailing should *not* be charged with double the deficient postage, but only with the actual balance not prepaid.

Very respectfully,

GEO. H. WILLIAMS.

Hon. JNO. A. J. CRESWELL,
Postmaster-General.

Defense of Suits against Public Officers.

DEFENSE OF SUITS AGAINST PUBLIC OFFICERS.

Judicial proceedings, by and in behalf of certain private parties, having been had before H. in the consular court at Alexandria, Egypt, while he held the office of consul-general there, against one D., the latter afterward instituted a suit against H. in the supreme court of the District of Columbia, complaining that he, H., acted in bad faith, maliciously, and without authority of law in said proceedings, whereby the plaintiff sustained great damage, &c. H. informed the Department of State of the pendency of the suit, asking that the United States assume the defense thereof: *Advised* that, as the proceedings against D. were not promoted by or in the interest of the United States, the latter are under no obligation to assume the defense of the suit.

DEPARTMENT OF JUSTICE,

February 20, 1873.

SIR: I have the honor to acknowledge the receipt of your letter of the 14th instant, inclosing the copy of a letter from Hon. Charles Hale to you, and also copies of pleadings in a case now pending in the supreme court of the District of Columbia, wherein Francis Dainese is plaintiff and said Charles Hale defendant, from which it appears that while Mr. Hale was consul-general at Alexandria, in Egypt, certain judicial proceedings were had before him, at the instance of Richard H. and Nathan B. Allen, against said Dainese, and on account of his action therein the said Dainese has now brought suit against him in the supreme court of the District of Columbia; and you say that Mr. Hale conceives that as he was at the time at which the occurrences complained of took place an officer of the United States, and exercising in good faith judicial functions which properly pertained to the office of consul-general in the Ottoman dominions, it becomes the duty of the Government to assume the defense of the suit, and to hold him harmless in the premises.

Dainese brings his suit, as I understand, alleging that Mr. Hale not only did not act in good faith in said proceedings, but acted without any authority of law, and that he, Dainese, has sustained damages in consequence of this alleged unlawful and malicious conduct.

I do not see upon what ground the United States are required to assume the defense of Mr. Hale, or to save him

Defense of Suits against Public Officers.

harmless in this suit. He was not acting at the time of the alleged grievance for or on behalf or for the benefit of the United States, and was acting at the instance and by the request of certain citizens of the city of New York. Whether he acted illegally and maliciously in those proceedings or not is a question to be determined by the court where the suit is pending. In any event, I do not see how those proceedings can establish any legal or equitable liability on the part of the United States to indemnify Mr. Hale. His position, as it seems to me, does not differ in principle from that of any United States judge who might be sued for unlawful, malicious, or corrupt action in his office, and I am sure that it would not be contended that the Government is bound to defend the judges of its courts in suits brought against them by private persons upon such grounds.

Where an officer of the United States is acting for the Government in any transaction, the benefits of which are to accrue to the Government, or where the end is to protect the interests of the Government, then there seems to be good ground why the Government should interpose and assume his defense, in case he is sued on account of such proceedings. But it is manifest that this rule does not require the Government to defend a judge in a suit brought against him by a citizen who had been a litigant in his court, on the ground that the decision of the judge was maliciously or corruptly given against him.

Exposure to suits of this kind is one of the incidents of holding such an office, and the responsibility of the Government would be very much enlarged if it was bound to defend its officers against all complaints that might be made against them for acts done in their official capacity, and in cases in which the Government was in no way concerned, but which relate exclusively to the rights and interests of private citizens.

My conclusion, therefore, is, notwithstanding the hardship of the case, that the Government is under no obligation to assume the defense of Mr. Hale in the above-mentioned suit.

Very respectfully,

GEO. H. WILLIAMS.

Hon. HAMILTON FISH,
Secretary of State.

Case of Lieutenant-Commander Dyer and others.

TERRITORIAL LEGISLATURE—SUBSIDIES.

The question presented here being very indefinite and vague, and partaking of a speculative character, it is deemed inadvisable by the Attorney-General to give his official opinion thereon.

DEPARTMENT OF JUSTICE,

February 27, 1873.

SIR: I have the honor to acknowledge the receipt of your communication of the 17th instant, inclosing a copy of a letter of the 29th ultimo, addressed to you by the governor of Montana, and requesting from me any suggestions I may deem proper touching the subject of his letter with a view to enable you to make him a suitable reply.

The subject presented by the governor's letter appears to be comprised in the following question which he asks: "Does the Territorial legislature possess the power to grant subsidies to private corporations to the extent that the courts have held that State legislatures do?"

In response to this question, I would suggest that the inquiry is one in which the United States does not seem to have any interest. It is a matter of purely local concern, and involves nothing that affects the General Government in any way. Besides, the question itself is not only very indefinite and vague, but partakes of a speculative character, inasmuch as it does not practically arise out of any existing case.

Regarding the subject in this light, I do not think the Attorney-General is authorized to express an official opinion thereon, or that it would be proper for him to do so.

I am, sir, with great respect, your obedient servant,

GEO. H. WILLIAMS.

Hon. HAMILTON FISH,

Secretary of State.

CASE OF LIEUTENANT-COMMANDER DYER AND OTHERS.

Neither the provisions of the act of July 25, 1866, chap. 231, nor those of the act of March 2, 1867, chap. 174, afford any ground for the claim that the officers selected from the volunteer naval service for appointment in the Regular Navy, under the former act, should be commissioned as of the date of that act, or take rank in the Regular Navy from the date thereof.

Case of Lieutenant-Commander Dyer and others.

Where a fictitious date in an officer's commission would be attended with prejudice to other officers in the same grade, it must be deemed improper to thus date the commission, unless there is clear authority of law for so doing.

Effect of the said act of 1867, relative to crediting the officers selected and appointed as aforesaid with the sea-service performed by them while volunteer officers, considered.

DEPARTMENT OF JUSTICE,

March 3, 1873.

SIR: I have the honor to acknowledge the receipt of your letters of the 8th of January and the 6th ultimo, inclosing papers in relation to the claim of Lieutenant-Commander N. Mayo Dyer and other officers of the Navy, who were formerly in the volunteer naval service, to a more advanced place in rank on the Navy-list than that now held by them respectively in virtue of their present commissions.

It seems that these officers were appointed in the Regular Navy under the provisions of the act of July 25, 1866, (14 Stat., 222,) authorizing the selection of a certain number of line-officers of the Navy from those persons who had served as officers in the volunteer naval service, and who were either then in that service or had been honorably discharged therefrom. The commissions received by them on their appointment bear date the 18th Dec., 1868, and their rank or place on the Navy-list in the grades to which they were severally appointed was fixed in accordance with that date.

Immediately after the passage of the act mentioned, and in pursuance of its provisions, a large number of officers belonging to the Regular Navy were promoted to fill vacancies created by that act, the date of their commissions being made to correspond with the date of the act, from which they accordingly took rank. But during the period intervening between the date of these promotions, viz, July 25, 1866, and the date of the commissions issued to the officers appointed from the volunteer service, viz, Dec. 18, 1868, other promotions were at the same time made to fill vacancies existing in the same grades to which these officers were appointed, and the recipients of the last-mentioned promotions, taking rank in accordance with the date of their commissions, all of which were issued prior to Dec. 18, 1868, occupy places in

Case of Lieutenant-Commander Dyer and others.

their respective grades on the Navy-list in advance of those held in the same grades by the officers whose claims are above referred to.

These officers contend that their commissions, like the commissions of those officers who were promoted immediately after the passage of said act, should have been dated as of the date of that act; that they were entitled to take rank on their appointment in their several grades next after the officers thus promoted, and before the officers already alluded to who received promotions during the period intervening as aforesaid; and I understand their claims to be, in substance, this: that they should be advanced to such places on the Navy-list as would now be held by them if, when originally appointed, they had been assigned to the relative positions to which, it is urged, they were then entitled.

With reference to these claims you submit the following questions for my opinion thereon:

"1. Whether the true meaning and intent of the act of July 25, 1866, according to its purport, be not to transfer the officers selected from the volunteer service as of the date of the act itself, and to rank from that date in the reduced rank to which they were assigned.

"2. If such be the true interpretation of the act, what, if anything, is the legal effect of the subsequent confirmation of the several officers referred to, no specific date of rank being named in the appointment or confirmation?

"3. Is the claim of these officers to rank from the date of the act of July 25, 1866, assisted by the subsequent act of March 2, 1867, section 3?

"4. If, in your opinion, the interpretation of the acts of Congress claimed by these officers is the true one, is the matter in its present condition one calling for departmental or congressional relief?"

The first and third questions submitted may be appropriately considered together, and for the sake of convenience I will so consider them.

By the 1st section of the act of July 25, 1866, it is provided, "That the number allowed in each grade of line-officers on the active-list of the Navy shall be, one admiral, one vice-admiral, ten rear-admirals, twenty-five commodores, fifty

Case of Lieutenant-Commander Dyer and others.

captains, ninety commanders, one hundred and eighty lieutenant-commanders, one hundred and eighty lieutenants, one hundred and sixty masters, one hundred and sixty ensigns, and in other grades the number now allowed by law: *Provided*, That the increase in the grades authorized by this act shall be made by selection from the grade next below of officers who have rendered the most efficient and faithful service during the recent war, and who possess the highest professional qualifications and attainments."

Section 2 provides "That of the number of line-officers of the Navy on the active-list, five lieutenant-commanders, twenty lieutenants, fifty masters, and seventy-five ensigns may be appointed from those officers who have served in the volunteer naval service for a period of not less than two years, and who are either now in that service or have been honorably discharged therefrom: *Provided*, That if by reason of these appointments the number of officers in any grade shall exceed the number fixed by law, no more promotions or appointments to that grade shall be made until the number is reduced below the number fixed by law for that grade: *And provided further*, That the authority given by this section shall be exhausted when the number of volunteer officers above named shall have been once appointed."

Section 3 provides "That the Secretary of the Navy shall appoint a board, consisting of not less than three naval officers, superior in rank to the officers to be thus appointed in the Regular Navy from the volunteer service, which board, after examination of the claims of all candidates, shall select and report to the Secretary of the Navy the most meritorious in character, ability, professional competency, and honorable service, the number to be appointed and transferred to the several grades mentioned in the second section of this act, provided they shall find that number who are suitably qualified therefor. And any officer who has served in the volunteer naval service for the term of two years or more shall have the right to appear before the examining board, and present his claims, and be examined for an appointment in the Regular Navy. And any volunteer officers attached to vessels at sea or on foreign stations may be

Case of Lieutenant-Commander Dyer and others.

appointed to the Regular Navy, subject to the condition contained in this section, after their return to the United States."

The remaining provisions of the act are unimportant in connection with the subject under consideration.

By the 3d section of the act of March 2, 1867, (14 Stat., 516,) it is enacted "that the officers of the volunteer naval service who now are or may be transferred to the Regular Navy or Marine Corps, shall be credited with the sea-service performed by them as volunteer officers, and shall receive all the benefits of such duty in the same manner as if they had been, during such service, in the Regular Navy or Marine Corps," &c.

It is very clear that the act of 1866 does not, of itself, effect a transfer of officers from the volunteer to the regular service. This is left to be done by appointment, upon selection made in the manner provided. Hence the questions under consideration involve simply the inquiry whether, according to the meaning and intent of the enactments referred to, the officers selected from the volunteer service should have their appointments or commissions dated as of the date of the act of 1866, (though actually made or issued at a subsequent period,) and take rank from that date.

The act of 1866, it will be observed, contains no provision which, in express terms, requires that these officers shall be commissioned, or take rank in their respective grades, as from its date; and if there is anything in the language of the act from which such a requirement can fairly be implied, I am unable to perceive it.

The 2d section of the act provides that a limited number of officers "may be appointed," in certain grades, from among those who have served as officers in the volunteer service for not less than two years; and the authority conferred upon the Executive to appoint persons who had thus served includes not only such as were then in the volunteer service, but such as had previously been honorably discharged therefrom. By the 3d section the Secretary of the Navy is required to appoint an examining board, before which any officer who has served in the volunteer naval service for the term of two years or more is given the right to appear and present his claims, and be examined for an appointment.

Case of Lieutenant-Commander Dyer and others.

This board, *after* examination of the claims of *all* candidates, is required to select and report to the Secretary the number *to be* appointed and transferred.

Here it is very plain the legislature does not contemplate that the appointments authorized by these provisions shall be made immediately. Something is to be done first, requiring the consumption of time, viz, an examination, selection, and report by said board, all of which must necessarily postpone to a future period the exercise of the authority to make the appointment. Upon the arrival of the period when that authority may be exercised, on what ground can it be claimed that the appointments then made should be antedated so as to correspond in date with the date of the act, or should be dated otherwise than of the date they are actually made? As already stated, the act itself does not expressly prescribe, nor does it appear to me to impliedly require, that such appointments shall be thus dated.

Among the parties examined by the board and reported as qualified for appointment, some there might be who were not at the time in the volunteer service, and whose connection therewith terminated one, two, or more years previously. With regard to persons of this description, in the absence of any provision in the act or any general provision of law prescribing a different date, the natural and proper way would obviously be to date the appointments as of the period when they are actually made, as in case of other appointments in the Navy from civil life. Now, no discrimination is made by the act between those persons who are and those who are not, at the time of the examination and report, in the volunteer service, concerning the date of appointment. In this respect they both stand on an equal footing; and I see no reason why the same rule in fixing such date should not be applied to both. Rank in the grade to which the appointment is made follows, of course, the date of the commission. (See section 1, act of July 16, 1862, chap. 183.)

It has hereinbefore been remarked that immediately after the passage of the act of 1866 a large number of officers in the Navy were advanced to fill vacancies created thereby, and that the dates of their commissions were made to correspond with the date of the act; but what time intervened between

Case of Lieutenant-Commander Dyer and others.

the date of the act and the date when the appointments of those officers to their advanced positions were made does not appear.

These appointments were made under the 1st section of the act which provides "that the increase in the grades authorized by this act shall be made by selection from the grade next below of officers who have rendered the most efficient and faithful service during the recent war, and who possess the highest professional qualifications and attainments." And it is suggested that if it was proper then to date the commissions back to the date of the statute, it was equally proper that the commissions issued on the appointments made under the 2d section of the act should have been so dated; since the act makes no distinction as to date of commission between the officers appointed under the two sections.

Plainly there is no more authority under the statute to antedate the commissions in the one case than there is in the other; and it seems to me that regularly and properly the commissions of the officers advanced in pursuance of the provisions of the 1st section should have borne the dates of the appointments of those officers, whensoever such appointments were made; however, I do not understand that by antedating their commissions the relative positions of those officers on the Navy list were made any different from what they would have been had their commissions not been antedated, or that any other officers were thereby affected. Practically, therefore, the dates which their commissions were made to bear are unimportant. With the commissions issued to the officers appointed under the 2d section it is otherwise. These commissions could not have been dated back to the date of the act without prejudice to other officers; and where a fictitious date in an officer's commission would be attended with such a result, it must be deemed improper to thus date the commission unless there is clear authority of law for so doing.

As to the 3d section of the act of 1867, quoted above, under which the officers appointed from the volunteer service are to be credited with the sea-service performed by them as volunteer officers, and to receive all the benefits of such duty in the same manner as if they had been during such serv-

Case of Lieutenant-Commander Dyer and others.

ice in the Regular Navy, this provision does not strike me as affording any support to the view that these officers should be commissioned or take rank as from the date of the act of 1866. Line-officers in the Navy, I understand, are credited with the sea-service performed by them, not so much with a view to future advancement in their relative position or rank as to future assignment to duty; though by regulation a certain period of sea-service (formerly two years, now one year) is required of officers in the four lower grades in the Navy, before, as a general rule, they will be nominated for promotion to the next higher grade. (See Regulations of 1855, page 46, par. 257; Regulations of 1870, page 130, par. 899.) The effect of the provision of 1867 unquestionably is, to give the officers selected from the volunteer service, after their appointment in the Regular Navy, the full benefit of the sea-duty performed by them while in that service. But except so far as such duty may go to complete the period of sea-service required in the four lower grades previous to nomination for promotion, or may be properly taken into account in the matter of assignment to duty, I am not aware of any benefit derivable therefrom, by law or usage, that affects the relations of an officer to the service. Very clearly it does not confer upon the officers referred to the right to have their commissions or their rank antedated.

Upon the whole, then, I do not think that either the provisions of the act of 1866 or those of the act of 1867 warrant the view that the officers selected from the volunteer service under the former act should be commissioned as of the date of that act, or that their commissions should be dated otherwise than of the date when their appointments were actually made; and accordingly I answer your first and third questions in the negative.

The answer to the first question referred to renders the consideration of the second by me unnecessary; but in regard to the fourth and last question, assuming, as I do, that the interpretation alluded to therein means only the affirmation of your first and third questions, it does not seem that, under the circumstances, a reply is needed thereto.

I may here state that, in examining the above questions, I have not felt myself called upon to express my opinion rel-

Execution of State Tax-Laws.

ative to the claims of the officers selected from the Volunteer Navy, in consideration of their previous services and rank, to priority of appointment over those who were advanced during the intermediate period between the date of the act of 1866 and the time when the officers so selected were appointed; nor relative to the right of the persons then advanced to the promotion then received by them.

These subjects are much discussed in the papers which accompanied your letter, but they do not appear to me to properly come within the scope of the questions submitted.

The papers mentioned are herewith returned.

I am, sir, very respectfully,

GEO. H. WILLIAMS.

Hon. GEO. M. ROBESON,
Secretary of the Navy.

EXECUTION OF STATE TAX-LAWS.

With respect to land owned by the United States within the limits of a State, over which the State has not parted with its jurisdiction, the United States stand in the relation of a proprietor simply; and the State officers have the same right to enter upon such land, or into the buildings located there, and seize the personal property of individuals for non-payment of taxes thereon, as they have to enter upon the land or into the buildings of any other proprietor for the same purpose; such right being so exercised as not to interfere with the operations of the General Government.

DEPARTMENT OF JUSTICE,

March 24, 1873.

SIR: I have the honor to acknowledge the receipt of your communication of the 11th instant, from which it appears that as to a part of the lands owned by the Government at West Point, in the State of New York, there has been no cession of jurisdiction by the State to the United States; that the local authorities have assessed county and school taxes on the personal property of several enlisted men whose quarters are located in said part of the Government lands; and that these men have done no act to gain residence or citizenship in that State.

On this state of facts, you submit for my opinion the following questions:

"1. Have State officers the right of entry to Government

Acting Secretary of War.

buildings on the land owned by the Government, but of which the State has not ceded jurisdiction, to satisfy, by seizure of personal property, a tax-warrant against any person in the military service?

"2. Have the State officers authority to seize personal property for taxes against persons in the military service at any place on the Government land, not within a building or inclosure?"

If the personal property referred to is of a kind subject to taxation by the laws of the State, and its *situs* is within the territorial jurisdiction of the State, I do not think the fact that the owner is an enlisted man in the service of the United States, and has done nothing to gain residence or citizenship in the State, is in itself sufficient to exempt the property from State taxation.

In regard to land owned by the United States within the limits of a State, over which the State has not parted with its jurisdiction, the United States stand in the relation of a proprietor; and the local officers have, in my opinion, the same right to enter upon such land, or into the buildings located there, and seize the personal property of individuals for non-payment of taxes thereon, as they have to enter upon the land or into the buildings of any other proprietor for the same purpose; it being understood that in the former case the right must be so exercised as not to interfere with the operations of the General Government.

Subject to these qualifications, I make an affirmative answer to your questions.

I am, sir, very respectfully, your obedient servant,
GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,
Secretary of War.

ACTING SECRETARY OF WAR.

In view of the 18th section of the act of July 15, 1870, chap. 294: *Held* that General William T. Sherman cannot act as Secretary of War without vacating his commission as General of the Army.

DEPARTMENT OF JUSTICE,
March 24, 1873.

SIR: I have the honor to acknowledge the receipt of your

 Congressional Printer.

letter of to-day, in which you submit, for my official opinion, the question as to whether or not William T. Sherman, General of the Army of the United States, can be authorized to perform the duties of Secretary of War during the temporary absence of that officer.

Section 18 of the act making appropriations for the support of the Army for the year ending June 30, 1872, and for other purposes, approved July 15, 1870, (16 Stat., 319,) is as follows: "That it shall not be lawful for any officer of the Army of the United States on the active list to hold any civil office, either by election or appointment, and any such officer accepting or exercising the functions of a civil office shall at once cease to be an officer of the Army, and his commission shall be vacated thereby."

General Sherman is on the active list of the Army, and the office of Secretary of War is a civil office. He cannot, therefore, be appointed to discharge the duties of that office, nor can he exercise its functions, without ceasing to be an officer of the Army of the United States.

I am, therefore, of the opinion that General Sherman cannot act as Secretary of War without vacating his commission as General of the Army.

Very respectfully,

GEO. H. WILLIAMS.

The PRESIDENT.

 CONGRESSIONAL PRINTER.

The 4th section of the act of June 25, 1864, chap. 155, making it the duty of the Superintendent of Public Printing "to cause to be printed, and stitched in paper covers, twenty-five hundred copies of the annual reports of the Executive Departments for the use of said Departments, respectively," is repealed by the provisions of the 3d and 4th sections of the act of May 8, 1872, chap. 140.

Hence, a requisition made by the Commissioner of Agriculture, under the 4th section of said act of June 25, 1864, would not authorize the Congressional Printer to print twenty-five hundred copies of the annual report of the former for the use of the Department of Agriculture.

DEPARTMENT OF JUSTICE,

April 2, 1873.

SIR: I have the honor to acknowledge the receipt of your communication of the 29th ultimo, in which A. M. Clapp,

Congressional Printer.

Congressional Printer, joins, submitting for my official opinion the question as to whether or not the Congressional Printer has authority, pursuant to a requisition by you, under section 4 of the act approved June 25, 1864, (13 Stat., 185,) to print twenty-five hundred copies of your report for the use of the Department of Agriculture.

Said section provides that it shall be the duty of the Superintendent of Public Printing to print the President's message, the reports of the heads of Departments, &c., and further provides that "it shall also be the duty of said superintendent to cause to be printed, and stitched in paper covers, twenty-five hundred copies of the annual reports of the Executive Departments for the use of said Departments, respectively."

Section 2 of the act approved May 8, 1872, (17 Stats., 82,) provides that "after the 30th day of June, 1872, it shall be the duty of each head of an Executive Department of the Government and of all other public officers who have heretofore had printing and binding done at the Congressional Printing-Office for the use of their respective Departments or public offices, to include in their annual estimates for appropriations for the next fiscal year such sum or sums as may to them seem necessary for printing and binding to be executed under the direction of the Congressional Printer." Pursuant to this section, \$20,000 were appropriated at the late session of Congress to provide printing and binding for the Agricultural Department for the fiscal year ending June 30, 1874.

Section 3 of said act describes the duties of the Congressional Printer under such appropriation, and declares that "it shall not be lawful for him to cause to be executed any printing or binding, the value whereof shall exceed the amount appropriated for such purpose."

Section 4 of the same act is as follows: "That all acts and parts of acts prescribing and limiting the number of congressional documents to be printed for the use of any head of Department or public office are hereby repealed."

These sections of the act of 1872, it seems to me, repeal section 4 of the act of 1864; and I am, therefore, of the opinion that the Congressional Printer has no authority, under a

Wisconsin Railroad Land-Grant.

requisition made in pursuance of said section 4, to print 2,500 copies of your report for the use of the Department of Agriculture. Printing and binding for the use of any Department are hereafter to be done by the Congressional Printer under appropriations by Congress made expressly for the Department demanding such work.

Very respectfully,

GEO. H. WILLIAMS.

Hon. FREED. WATTS,
Commissioner of Agriculture.

WISCONSIN RAILROAD LAND-GRANT.

The Wisconsin Central Railroad Company is entitled, under the provisions of the act of May 5, 1864, chap. 80, and the joint resolution of June 21, 1866, [No. 53,] to receive patents for the lands coterminous with each section of twenty miles of road north of Steven's Point, duly certified to be completed according to the requirements of said act, without reference to the commencement or construction of the road from Portage City to Steven's Point.

DEPARTMENT OF JUSTICE,
April 3, 1873.

SIR: I have examined the 3d and 7th sections of the act of Congress approved May 5, 1864, (13 Stat., 66,) "granting lands to aid in the construction of certain railroads in the State of Wisconsin," the legislation of the State of Wisconsin in reference thereto, and the joint resolution of Congress [No. 53,] (14 Stat., 360,) to all of which you refer in your communication of the 7th ultimo, in connection with the question therein presented for my opinion, whether patents should issue to the Wisconsin Central Railroad Company for such lands as are coterminous with the twenty miles of its road completed from Steven's Point toward Lake Superior.

The 3d section of the act of Congress enacts "That there be, and is hereby, granted to the State of Wisconsin, for the purpose of aiding in the construction of a railroad from Portage City, Berlin, Doty's Island, or Fond du Lac, as said State may determine, in a northwestern direction to Bayfield, and thence to Superior, on Lake Superior, every alternate section of public land designated by odd numbers, for ten sections in

Wisconsin Railroad Land-Grant.

width on each side of said road," and in case any of these had been reserved or otherwise disposed of, or were subject to homestead or pre-emption rights, other odd-numbered sections in lieu of the same, within twenty miles of the line of said road on each side.

Section 7 enacts "That whenever the companies to which this grant is made, or to which the same may be transferred, shall have completed twenty consecutive miles of any portion of said railroads, supplied with all necessary drains, &c., * * * patents shall issue, conveying the right and title to said lands to the said company entitled thereto, on each side of the road, so far as the same is completed, and coterminous with said completed section, not exceeding the amount aforesaid, and patents shall issue in like manner as each twenty miles of said road is completed," upon receipt by the Secretary of the Interior of a statement verified by the oath of the president of the railroad company and certified by the governor of the State, of the completion of such twenty miles in the manner required by the act, &c.

In 1866 the State, to avail herself of this grant, chartered two railroad companies, the "Winnebago and Superior," and the "Portage and Superior." (Chap. 314, 362, Priv. and Loc. Laws, 1866.)

Section 2 of the charter of the Winnebago and Superior Company authorizes that company to construct a road from Doty's Island, by way of Waupaca and Steven's Point, to Bayfield, and thence to Superior, on Lake Superior, and has the following proviso: "*Provided*, That the said railroad from the said Steven's Point to Superior shall be surveyed, located, constructed, maintained, and operated by the company hereby created, jointly and in common with any railroad company that may be authorized by act of the legislature to locate, construct, and operate a railroad from Portage City, in the county of Columbia, to Superior aforesaid, by way of Steven's Point, having and possessing like powers, privileges, rights, and interests as are hereby conferred upon the company created by this act, so far as relates to the line of said railroad from Steven's Point to Superior: *And provided further*, That said Winnebago and Superior Railroad Company may at any time consolidate with any railroad company that

Wisconsin Railroad Land-Grant.

may, by act of the legislature, be authorized to consolidate with the company hereby created, upon terms to be mutually agreed upon, in which case the said railroad from the said Steven's Point to Superior shall, from the time of such consolidation, be located, constructed, maintained, and operated by the corporation arising therefrom."

Section 7 of the charter provides "that the company shall commence the construction of its railroad at the aforesaid Doty's Island or Steven's Point, and for the purpose of estimating the amount of land to which such company may be entitled on account of building such road, the said Steven's Point shall be deemed the point of commencement, and the company shall be entitled to land in the manner specified by the act of Congress and by this act, as the road progresses from Steven's Point, but in no other manner."

And section 8 enacts that the company shall be entitled to one undivided half of the lands granted along the line of the road from Steven's Point to Superior, with the proviso "that whenever the company hereby created shall become consolidated with any other railroad company * * * such consolidated company shall become entitled to and invested with the title to all the land granted by said act of Congress pertaining to said portion of said railroad between the said Steven's Point and Superior."

The charter of the Portage Company provided that said company shall locate, construct, operate, and maintain the railroad from Steven's Point to Superior jointly and in common with any railroad company that may be authorized to construct a road from Doty's Island to Superior, and also provides for consolidation "with any railroad company that may be authorized by act of the legislature to consolidate with the said Portage and Superior Railroad Company, upon terms to be mutually agreed upon, in which case the said railroad from Steven's Point to Superior shall, from the time of such consolidation, be located, constructed, maintained, and operated by the corporation arising therefrom."

Section 8 is as follows: "The company hereby created shall commence the construction of its railroad at the aforesaid city of Portage, and for the purpose of estimating the amount of lands to which said company may be entitled on

Wisconsin Railroad Land-Grant.

account of building such road, the said city of Portage shall be deemed the point of commencement, and the company shall be entitled to land in the manner specified by the act of Congress and as herein provided, as the road progresses from the said city of Portage, but in no other manner: *Provided, however,* That the company or companies herein authorized may construct, or authorize to be constructed, so much of the road as may be on the designated route from Bayfield to Superior, on Lake Superior, or one hundred miles thereof, on the line of the designated route in a southerly direction from Bayfield, and shall be entitled to receive all the lands applicable to that purpose as soon as the road may be constructed."

Section 9 in this charter and section 10 in the Winnebago and Superior charter are the same: "The governor of this State, on the request of the company hereby created, shall, without delay, from time to time, upon the completion of any and every twenty continuous miles of the railroad or railroads in this act authorized to be constructed, certify the fact of such completion to the Secretary of the Interior in accordance with the provisions of the aforesaid act of Congress."

For reasons apparent on the face of this legislation, it became necessary to submit it for the sanction of Congress, which was done, and in June, 1866, the joint resolution above mentioned was passed, approving and confirming what had been done by the legislature of the State; and for the purpose of this communication only the provisions of the two charters provided to carry the grant into effect need to be considered. The two charters were approved within a day or two of each other, and are so closely connected in the several provisions of each relative to the disposition to be made of the grant, that those provisions must be construed together, and if by a reasonable construction effect can be given to all of them, that is the construction that should be adopted.

It will be observed (1) that the charter of the Winnebago and Superior Company gives that company the right to commence construction at whichever of the two points it might choose, Doty's Island or Steven's Point, but provides that

Wisconsin Railroad Land-Grant.

lands shall be counted to it only as construction should progress beyond Steven's Point; (2) that the company should construct the road north of Steven's Point jointly and in common with any other company that might be chartered, having and possessing like powers, privileges, rights, and interests as are hereby conferred upon the company created by this act, so far as relates to the line of said railroad from Steven's Point to Superior, and the charter of the Portage and Superior Company contains a like provision. As to that line of road, then, neither company had any rights, powers, privileges, or interests more than the other; they stood equal; while as to their respective roads, south of Steven's Point, each was entirely independent of the other.

It is evident, therefore, that the line of road from Steven's Point to Lake Superior was intended by the legislature, as to location, construction, &c., to be a separate work entirely from the line of road to meet at Steven's Point from the south, and to be taken charge of by the consolidated company provided for in both charters.

This consolidation was effected between the two companies by articles executed May 1, 1869. It is now claimed by those specially interested in the line from Portage City to Steven's Point, as appears by the papers in the case, that section 8 of the charter of the Portage and Superior Company, because it provides that the company should commence construction of "its road" at Portage City, and that lands should be counted to it only as its road should progress from Portage City, creates a condition-precedent, upon the fulfillment of which only lands may be patented on account of construction north of Steven's Point, and that the consolidated company is not entitled to patents on that account, and will not be, except by commencement of the road to be built from Portage City to Steven's Point, and according to the progress of the construction of that road. This proposition does not seem to be well grounded. The Winnebago and Superior Company being authorized to commence construction at Steven's Point without limitation as to time, but jointly and in common with the other company, and the construction of the line beyond that place being, as above suggested, clearly made by the legislature a work to be performed by the co-operation of the two

Wisconsin Railroad Land-Grant.

companies, irrespective of either of the lines of road from Doty's Island and Portage City, it is fairly to be inferred that it was intended to be commenced as early, and its construction prosecuted as vigorously, as practicable. It is also to be inferred that whenever the Winnebago Company should be ready to commence at Steven's Point, it was not only the right but the duty of the other company at once to co-operate, and that it was not the intention of the legislature to postpone the construction of the line beyond Steven's Point to the commencement or construction of either line south of it, but that if the legislature had so intended it would have provided in the charter of the Winnebago Company that, while it might commence at either Doty's Island or Steven's Point, it should nevertheless, before breaking ground at the latter place, await the completion by the other company of its independent branch from Portage City.

The consolidation contemplated by the legislature having taken place, the new company created thereby succeeds to all the powers, privileges, rights, and interests of the two original companies, and is entitled to and invested with the title to all the lands granted by said act of Congress pertaining to said portion of railroad between said Steven's Point and Superior. It has the same right that the Winnebago Company had, and, as I think clearly appears, that the Portage Company had, to commence at Steven's Point and to proceed with the construction of the road on to Lake Superior, without reference to the commencement or construction of the road from Portage City to Steven's Point, and it is entitled to receive patents for the lands coterminous with each section of twenty miles duly certified to be completed according to the requirements of the act of Congress; and I am of opinion that the provision in the 8th section of the charter of the Portage and Superior Company, that its road should be commenced at Portage City, and that lands should be counted to the company only according to the progress of construction from that place, relates only to the line and the lands along the same thence to Steven's Point, which alone, in the language of the section, was "its road," and not to the line beyond Steven's Point, in which it had only an equal joint and common interest with the other company.

Printing Wooden Mail-Tags.

Of course the consolidated company is under obligations to construct the road from Portage City to Steven's Point, and to do this as speedily as the law and the obligations of good faith require. Whether the legislature has provided security for the due performance of that duty is not a matter before me for consideration.

The papers which accompanied your communication, as therein requested, are herewith returned.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. C. DELANO.

PRINTING WOODEN MAIL-TAGS.

A patent for printing wooden mail-tags by a particular machine and process is not infringed where the tags are printed or produced by a different machine and process.

DEPARTMENT OF JUSTICE,

April 4, 1873.

SIR: I have examined the papers submitted to me under cover of your letter of the 1st ultimo, touching the subject of printing wooden mail-tags for the use of the Post-Office Department.

The question which you present is, whether Fayman's patent for "an alleged new and useful improvement in machines for printing mail-tags" would be infringed by the manufacture of the tags required for the use of the Department by any other person than the assignee of the patentee, provided such other person should print the same by some other machine or process? I do not see how any doubt could have arisen upon this question. The subject of the patent being a particular machine for printing tags, it is very clearly no infringement of such patent if the tags are printed or produced by a different machine or process. Your question is accordingly answered in the negative.

I return herewith the papers received with your communication.

I am, sir, very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. JNO. A. J. CRESWELL,

Postmaster-General.

Enlistment of Minors in the Army.

ENLISTMENT OF MINORS IN THE ARMY.

Prior to the act of May 15, 1872, chap. 162, the law as to the enlistment of minors in the Army stood thus: 1. Minors above the age of eighteen might lawfully be enlisted without the consent of parents or guardians; 2. They might lawfully be mustered into service between the ages of sixteen and eighteen with the consent of parents or guardians; 3. They could not be mustered into service under the age of sixteen; 4. The oath of enlistment was conclusive as to the age of the recruit.

That act only so far modified the previous law as to prohibit the enlistment of persons under the age of twenty-one, who have parents or guardians entitled to their custody and control, without the written consent of such parents or guardians, leaving in full force the provision making the oath of enlistment conclusive as to the age of the recruit.

However, in executing the provisions of the 20th section of the act of February 24, 1864, chap. 13, and the 5th section of the act of July 4, 1864, chap. 237, the Secretary of War, upon whom that duty devolves, is not concluded by the oath of enlistment on the question of age.

Seem that where a recruit, in taking the oath of enlistment, "knowingly and willingly" swears falsely, he is indictable for perjury under the 13th section of the act of March 3, 1825, chap. 65.

DEPARTMENT OF JUSTICE,

April 5, 1873.

SIR: I have the honor to acknowledge the receipt of your letter of the 18th ultimo, in which you request an opinion upon the following questions propounded by the Adjutant-General:

"1st. Do the terms of the act of May 15, 1872, make it obligatory to discharge a man who has been enlisted without fraud or carelessness on the part of the Government agent, his own oath as to his age being taken as confirming his personal appearance, but who is afterward proved by the evidence required from parents and disinterested witnesses to have been a minor?"

"2d. Does the act of May 15, 1872, repeal or impair the force of the clause in the act of February 13, 1862, making the recruit's oath conclusive as to his age?"

"3d. Can a man who has thus sworn to his being over twenty-one years of age be tried by civil court for legal perjury, when his discharge is claimed upon affidavits of his parents, guardians, or master?"

Enlistment of Minors in the Army.

"4th. Can a man, under the circumstances stated in the third question, be tried by civil court for obtaining goods (i. e., clothing, subsistence, transportation, &c.) under false pretences?"

In passing upon these questions, I shall vary their order somewhat, and first consider the second question propounded.

By virtue of the provisions of the 1st and 3d sections of the act of December 10, 1814, (3 Stat., 46, 47,) officers employed in the recruiting-service were authorized to enlist minors over the age of eighteen, with or without the consent of their parents or guardians.

The 5th section of the act of September 28, 1850, however, (see 9 Stat., 507,) made it the duty of the Secretary of War "to order the discharge of any soldier of the Army of the United States who, at the time of his enlistment, was under the age of twenty-one years, upon evidence being produced to him that such enlistment was without the consent of his parent or guardian."

But this provision of the act of 1850 was repealed by the 2d section of the act of February 13, 1862, (12 Stat., 339,) in which it is also declared that "hereafter no person under the age of eighteen shall be mustered into the United States service, and the oath of enlistment taken by the recruit shall be conclusive as to his age."

Subsequently, by section 18 of the act of March 3, 1865, (13 Stat., 490,) it was provided that any officer should be dishonorably dismissed the service, upon conviction by court-martial, who should knowingly muster into the military or naval service any minor between the ages of sixteen and eighteen years without the consent of his parents or guardian, or any minor under sixteen years of age; and it has been supposed that this statute, by implication, modified the act of 1862, above cited, so far as to authorize the enlistment of minors between the ages of sixteen and eighteen with the consent of their parents or guardians.

The result of the foregoing legislation would seem to be, 1st, that minors above the age of eighteen might lawfully be enlisted without the consent of their parents or guardians; 2d, that they might lawfully be mustered into service between the ages of sixteen and eighteen *with* the consent of

Enlistment of Minors in the Army.

their parents or guardians; 3d, that they could not be mustered into service under the age of sixteen; and, 4th, that the oath of enlistment was to be conclusive as to the age of the recruit.

Thus stood the law respecting the enlistment of minors at the passage of the act of May 15, 1872, (17 Stat., 117, 118.) The 1st section of this act provides, "That no person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians: *Provided*, That such minor shall have such parents or guardians entitled to his custody and control." This statute does not appear to alter or modify the pre-existing law except in regard to one particular, viz, the enlistment of minors. Previous to its enactment, persons under the age of twenty-one and above the age of eighteen, as has been shown, were authorized to be enlisted without the consent of their parents or guardians; since its enactment, persons of that description, including also minors between the ages of sixteen and eighteen, who have parents or guardians entitled to their custody, are not authorized to be enlisted except with the written consent of such parents or guardians.

It leaves in full force the provision of the act of 1862, making the oath of enlistment conclusive as to the age of the recruit, unless there is such a repugnancy between this provision and the provision of the act of 1872, above quoted, that the two provisions cannot stand together, and that an implied repeal of the former might well be presumed. But I am unable to perceive anything in the provisions which makes them inconsistent with or repugnant to each other. The act of 1872 prohibits the enlistment of persons under the age of twenty-one who have parents or guardians entitled to their custody and control, without the written consent of such parents or guardians; while the act of 1862 declares that the oath of enlistment taken by the recruit shall be conclusive as to his age. There is no more repugnancy between these provisions than there was between the provisions of the latter act as it originally stood, by which the muster into service of persons under the age of eighteen was prohibited and the oath of enlistment made conclusive as to age.

Enlistment of Minors in the Army.

Accordingly, in response to your second question, I answer in the negative.

Recurring now to your first question: if by the oath of enlistment it appears that the person enlisted is under twenty-one, and it is shown by satisfactory proof that he has parents or a guardian entitled to his custody and control, and that he was enlisted without the written consent of such parents or guardian, it would, I think, in view of the provisions of the act of 1872, prohibiting the enlistment of a minor under those circumstances, be the duty of the Government to discharge him from service. On the other hand, if it appears by the oath of enlistment that the party was above the age of twenty-one when he enlisted, that alone would be decisive so far as the obligation to discharge is concerned, unless the case should fall within the provisions of the 20th section of the act of February, 24, 1864, and the 5th section of the act of July 4, 1864, (13 Stat., 10, 380,) when a different rule would apply; as in executing these provisions the Secretary of War, upon whom that duty devolves, is not concluded by the oath of enlistment as to the question of age.

In regard to the subject of your third question, I may observe that perjury is indictable as an offense against the United States only in cases where it is made an offense by the laws of Congress. I am not aware of any statute which specially provides that the making of a false oath of enlistment shall be deemed to be or be punished as perjury; and unless such a case would fall within the general provision of the act of March 3, 1825, section 13, (14 Stat., 118,) it would seem to be unprovided for.

That section enacts that "if any person in any case, matter, hearing, or other proceeding, where an oath or affirmation shall be required to be taken or administered under or by any law or laws of the United States, shall, upon the taking of such oath or affirmation, knowingly and willingly, swear or affirm falsely, every person so offending shall be deemed guilty of perjury," &c.

Perhaps this provision would be held to cover the case referred to, where the oath was administered by competent authority, and the party charged "knowingly and willingly" swore falsely.

 Claim of F. W. Anschultz.

Respecting your fourth and last question, I know of no statute of the United States under which a party could be indicted upon the facts and circumstances therein stated; nor do I think that an indictment for obtaining goods under false pretenses could be sustained under any State law within my knowledge upon the same facts and circumstances.

Very respectfully,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,
Secretary of War.

 CLAIM OF F. W. ANSCHUTZ.

Mode of ascertaining damages to property under the act of July 20, 1868, chap. 184, which provides for the right of way over lands needed for the construction of the canal around the Des Moines Rapids of the Mississippi River, stated.

Upon the assumption that the pipes through which claimant derived his supply of water were laid and in use on his land before the acquisition of the right of way over the same: *Held* that the direct and probable loss or injury which he would necessarily sustain by the construction of the canal, in being compelled to remove and relocate them, constituted a proper element of charge, along with the value of the land, in estimating the compensation for such right of way.

DEPARTMENT OF JUSTICE,
April 7, 1873.

SIR: I have examined the papers which accompanied your letter of the 10th ultimo, touching the claim of F. W. Anschutz, for alleged damages to the water-supply of his brewery, occasioned by the construction of the canal around the Des Moines Rapids of the Mississippi River.

The act of July 20, 1868, (15 Stat., 124,) in providing for the right of way over any lands needed for that improvement, contemplates that the value thereof shall be ascertained in the mode provided by the laws of the State, with a proviso, however, that where the owner of the property fixes a price for the same which, in the opinion of the officer in charge of the improvement, is reasonable, the latter may take the same at such price.

Assuming that the pipes through which the claimant's brewery was supplied with water were laid and in use pre-

Internal-Revenue Collection-Districts.

vious to the acquisition of the right of way over his land, I think the direct and probable loss or injury which he would necessarily sustain by the construction of the canal, in being compelled to remove and relocate them, would have constituted a proper element of charge, along with the value of the land, in estimating the compensation for such right of way.

The papers do not disclose whether this compensation was ascertained in the mode provided by the State laws, or whether it was fixed by the owner. If by the former mode, it is to be presumed, in the absence of anything appearing in the proceedings to the contrary, that the loss or injury referred to was taken into account and included in the amount of compensation awarded. If by the latter mode, it must be within the knowledge of the officer in charge of the work at the time, whether the damages were estimated or not.

Should it be found, after investigation and with a reasonable degree of certainty, that the claimant has not in fact been allowed for damage sustained under the circumstances hereinbefore stated, I perceive no objection to its payment at this time.

The papers mentioned are herewith returned.

I have the honor to be, very respectfully,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,

Secretary of War.

INTERNAL-REVENUE COLLECTION-DISTRICTS.

The provision in the 2d section of the act of July 1, 1862, chap. 119, re-adopted by the 7th section of the act of June 30, 1864, chap. 173, limiting the number of internal-revenue collection-districts in any State, is unrepealed by the provision in the act of July 12, 1870, chap. 251, authorizing the President, at his discretion, to "divide the States and Territories respectively into convenient collection-districts, or alter the same," &c. The restriction as to the number of such districts imposed by the former provision is still in force.

DEPARTMENT OF JUSTICE,

April 9, 1873.

SIR: I am in receipt of your letter of the 28th ultimo, inclosing copy of a communication to you from the Commis-

Internal-Revenue Collection-Districts.

sioner of Internal Revenue, dated the 26th ultimo, and requesting, at his suggestion, my opinion upon the following question :

"Is the restriction as to the number of collection-districts in any State, which was imposed by the 2d section of the act of July 1, 1862, (12 Stat., 432,) still in force?"

The 2d section of the act of 1862, to which reference is made, provided, "That for the purpose of collecting, assessing, and levying the duties or taxes hereinafter prescribed by this act, the President of the United States be, and he is hereby, authorized to divide, respectively, the States and Territories of the United States, and the District of Columbia, into convenient collection-districts, and to nominate and, by and with the advice and consent of the Senate, to appoint an assessor and collector for each such district, who shall be residents within the same: *Provided*, That any of said States and Territories, and the District of Columbia, may, if the President shall deem it proper, be erected into and included in one district, provided that the number of districts in any State shall not exceed the number of Representatives to which such State shall be entitled in the present Congress, except in such States as are entitled to an increased representation in the Thirty-eighth Congress, in which States the number of districts shall not exceed the number of Representatives to which any such State may be so entitled: *And provided further*, That in the State of California the President may establish a number of districts not exceeding the number of Senators and Representatives to which such State is entitled in the present Congress."

This section was continued in force by the 7th section of the act of June 30, 1864, (13 Stat., 224,) which contains an additional provision authorizing the President "to alter the respective collection-districts provided for in said section, as the public interests may require."

By a proviso in the act of July 12, 1870, making appropriations for the legislative, executive, and judicial expenses of the Government, (16 Stat., 239,) it was enacted "that the President may, at his discretion, divide the States and Territories, respectively, into convenient collection-districts, or alter the same, or unite two or more districts, or two or more

Internal-Revenue Collection-Districts.

States or Territories, into one district, and may exercise said power from time to time, as in his opinion the public interests may require."

Subsequently, by the 43d section of the act of June 6, 1872, (17 Stat., 257,) the President was directed, prior to January 1, 1873, to "reduce the internal-revenue districts in the United States to not exceeding eighty in number," and for that purpose he was authorized "to unite two or more districts, or States or Territories, into one district," &c.

But, before any reduction in the number of districts was made under this section, it was expressly repealed by the 7th section of the act of December 21, 1872, "for the reduction of officers and expenses of the internal revenue."

Section 43 of the act of 1872 did not in terms, nor as I conceive by necessary implication, repeal any of the provisions above mentioned which were previously in force. It devolved upon the President a particular duty, which he was required to discharge within a stated time; but it left those provisions in full and unrestricted operation during that time, or at least until the duty imposed thereby should be performed; and as the section itself was repealed before this took place, the provisions adverted to must be regarded as now having precisely the same scope and effect which they had prior to the enactment of that section.

The solution of the question under consideration, then, depends upon whether the following provision in the 2d section of the act of 1862, which was continued in force by the 7th section of the act of 1864, viz, "That the number of districts in any State shall not exceed the number of Representatives to which such State shall be entitled in the present Congress, except in such States as are entitled to an increased representation in the Thirty-eighth Congress, in which States the number of districts shall not exceed the number of Representatives to which any such State may be so entitled," is repealed by the provision in the act of 1870, hereinbefore mentioned.

As the latter provision does not expressly repeal the former, the inquiry arises whether there is such an inconsistency or repugnancy between the two provisions as to amount to an implied repeal of the earlier enactment by the later one.

Internal-Revenue Collection-Districts.

By reference to the 2d section of the act of 1862, and the 7th section of the act of 1864, it will be observed that prior to the act of 1870 the President had authority under those sections to divide the States and Territories into convenient collection-districts, or include any State or Territory in one district, or alter the respective collection-districts as the public interests might require; and the exercise of this authority was discretionary with him, subject to the limitation imposed as to the number of such districts authorized to be established in any State.

The act of 1870 provides that the President shall have substantially the same authority, as to dividing the States and Territories into convenient collection-districts or altering the same, which he previously possessed, and in addition thereto it gives him power "to unite two or more districts or two or more States or Territories into one district." So far from the grant of the additional power being repugnant or inconsistent with the limitation previously imposed, respecting the number of districts in any State, it obviously leads in the same direction as that limitation, and is entirely consonant therewith. And in regard to the other powers granted by the act of 1870, those powers, as already stated, existed before that act, coupled with the limitation referred to, with which they do not seem to be in any respect incompatible; and I think they should be regarded, in the absence of anything in that act clearly indicative of a contrary intention on the part of the legislature, as still subject to the same limitation.

This view of the statute of 1870 is fortified by the idea which clearly pervades all the legislation upon the subject since 1862, to wit, that, as the taxes were being reduced by Congress, the reduction of the force for their collection became desirable; and there is no ground to suppose that Congress intended to provide for an increase of officers for that purpose, when the reasons were obvious and imperative for a contrary course.

Having arrived at the conclusion that the provision in the 2d section of the act of 1862, re-adopted by the 7th section of the act of 1864, limiting the number of collection-districts in any State, is unrepealed by the provision in the act of 1870, above cited, I have to say, in answer to your question,

United States Mint.

that, in my opinion, the restriction as to the number of such districts imposed by the former provision is still in force.

I have the honor to be, very respectfully,

GEO. H. WILLIAMS.

Hon. WM. A. RICHARDSON,

Secretary of the Treasury.

UNITED STATES MINT.

Coins cannot be struck at the United States Mint for foreign governments, of such standards and devices as those governments may adopt; there being no authority given by statute to employ the mint for that purpose.

DEPARTMENT OF JUSTICE,

April 10, 1873.

SIR: I have considered the question submitted in your letter of the 25th ultimo, as to whether coins may be struck at the United States Mint for other governments and nationalities, of such standards and devices as those governments and nationalities may adopt.

It is very obvious that, unless authority to thus employ the mint has been conferred by statute, it cannot be used for the purpose mentioned; and, after careful examination of the laws relating to the mint, I have failed to discover any provision from which such a power may be derived.

The provision in section 52 of the recent act of February 12, 1873, authorizing "national and other medals to be struck by the coiner of the mint at Philadelphia, under such regulations as the superintendent, with the approval of the director of the mint, may prescribe," was clearly not meant to include the making of anything intended for circulation as money, and is therefore inapplicable.

On the other hand, by section 17 of the same act, it is declared that "no coins, either of gold, silver, or minor coinage, shall hereafter be issued from the mint, other than those of the denominations, standards, and weights herein set forth." The denominations, standards, and weights there referred to are such as are fixed for the gold, silver, and minor coins of the United States by the 13th, 14th, 15th, and 16th sections of the act. So that the 17th section would seem to operate

Pensions.

as a direct prohibition of the use of the mint for the purpose stated in the question propounded by you.

I am, accordingly, of opinion that coins cannot be struck at the mint of the United States for other governments, of such standards and devices as those governments may adopt.

I have the honor to be, very respectfully,

GEO. H. WILLIAMS.

Hon. WM. A. RICHARDSON,

Secretary of the Treasury.

PENSIONS.

The widow of a deceased naval officer was allowed a pension from June 23, 1843, the date of his death, up to April 8, 1847, the date of her second marriage, after which it was discontinued. In 1854 she obtained a divorce from her second husband for intemperance and cruelty. She now alleges that the latter, at the time of her marriage with him, had a wife living, and that she was cognizant of this when she instituted her suit for divorce, but remained silent as to the fact. And she claims a restoration of the pension formerly allowed her as the widow of said officer, on the ground that her second marriage was illegal and her right to the pension was not determined thereby. *Held*, however, that by promoting said suit, and procuring a decree which in effect affirmed the validity of her marriage while declaring its dissolution, the claimant has rendered the objection of illegality of the marriage unavailable in support of her claim, so long as that decree stands unvacated or judicially unimpeached.

In that suit both the fact and the validity of the second marriage were directly in issue as the very foundation of the proceeding; and a sentence of divorce, so far as it affects the *status* of the parties, is regarded as a judgment *in rem*, and, if free from fraud, furnishes in general conclusive proof of the facts which were in issue and were adjudicated by it, as well against strangers as against the parties.

The claimant ought not to be permitted to prevail against proof of this high character, by showing, after the lapse of twenty years from the rendition of the decree of divorce, that she obtained it upon a misrepresentation of the facts to the court.

DEPARTMENT OF JUSTICE,

April 19, 1873.

SIR: The case presented by your communication of the 28th ultimo, in connection with a pension-claim pending in your Department, is substantially as follows:

In 1848 the claimant was allowed a pension, as the widow

Pensions.

of a naval officer, from June 23, 1843, the date of his death, to April 8, 1847, the date of her second marriage, after which it was continued to her minor children by her first husband until the youngest reached the age of sixteen years, in June, 1852. In 1854 she obtained a divorce from her second husband on the ground of intemperance and cruelty. She now alleges that her second husband, at the time of her marriage with him, had a wife living, from whom he had been divorced *a mensa et thoro* in Louisiana; that she was cognizant of this when she instituted her suit for divorce, but that she was silent as to the fact, apprehending that if a nullity of the marriage was decreed on the ground of incapacity on the part of the husband to enter into the contract, it would have the effect of rendering the fruit of the marriage illegitimate; and she claims a restoration of the pension formerly allowed to her as the widow of the said officer, dating from June, 1852.

Upon this you inquire whether the second marriage of the claimant was void *ab initio*, or simply voidable, and also whether, by successfully prosecuting a suit for divorce on the ground stated, she has waived any right she might otherwise have been entitled to in the premises.

Where a marriage is entered into during the existence of a previous marriage of one of the parties, the contract is not merely voidable, but void *ab initio*; and hence, assuming the fact to be as represented by the claimant, that her second husband, when she married him, had a wife living, the marriage between them, in contemplation of law, was void from the beginning.

But whether such an assumption is warranted by the circumstances of this case is not free from doubt, if the existence of the previous marriage of the husband, at the time of his marriage with the claimant, rests upon nothing more than an inference drawn from the fact that he had been divorced *a mensa et thoro* from his former wife, and that she was then still living. I should not regard this as satisfactory; for, conceding the truth of those facts, they are not inconsistent with the fact that a subsequent divorce *a vinculo matrimonii* may have been obtained between the parties to the former proceeding prior to the marriage with the claimant. In Louisi-

Pensions.

ana, at the period referred to, a divorce *a vinculo* could not be granted in certain cases unless a decree of divorce *a mensa et thoro* had been previously rendered, and unless two years had expired from the date of such decree. Accordingly, if the decree *a mensa et thoro* in this case was rendered more than two years before the marriage with claimant, it is not improbable that that decree was followed by a divorce *a vinculo* previous to such marriage; and without other evidence than the decree *a mensa et thoro*, the existence of the former marriage of claimant's second husband when she married him could not well be considered as established.

Besides, in the suit for divorce promoted by the claimant herself, both the fact and the validity of her second marriage were directly in issue as the very foundation of the proceedings, and the effect of the sentence or decree granting the divorce was to affirm the marriage as well as declare its dissolution. (2 Bishop, Mar. and Div., 4th ed., sec. 362, 765.)

Irrespective of the point which here suggests itself, as to whether the judgment in that suit, rendered as it undoubtedly was upon the claimant's own allegation of a valid marriage and the evidence appearing in the case in support thereof, should be deemed conclusive upon her in any matter or claim now prosecuted by her wherein the question of the validity of her second marriage is involved, it is certainly entitled to great weight simply as evidence of the facts put in issue and decided thereby, and so long as it stands judicially unimpeached it affords just as strong a presumption in favor of the validity of the marriage which it dissolved as is afforded by the above-mentioned decree *a mensa et thoro* in favor of the validity of the marriage on which that decree passed.

But it seems to me that the affirmative of that point is sustainable upon settled principles of law, and that the judgment referred to should be held conclusive upon the claimant as to the validity of her second marriage. A sentence of divorce, so far as it affects the *status* of the parties, is regarded as a judgment *in rem*, and, if free from fraud, furnishes, in general, conclusive proof of the facts which were in issue and were adjudicated by it, as well against strangers as against the parties. The claimant ought not to be permitted to pre-

 Additional Bounty.

vail against proof of this high character furnished by the decree in the suit promoted by her, which in effect affirmed the validity of the marriage, by showing, after a lapse of nearly twenty years, that in obtaining the decree she has misrepresented the facts to the court.

In regard to the other branch of your inquiry, whether the claimant has waived any right by prosecuting and obtaining a divorce on the grounds stated, I do not perceive how any question of *waiver* can properly arise in this case. By promoting a suit for the dissolution of the marriage instead of a suit for its nullity, and procuring a decree which in effect affirmed the validity thereof, the claimant cannot strictly be said to have waived any objection to the legality of the marriage; but she has, I think, rendered that objection unavailable in support of her claim, so long at least as the decree stands unvacated or judicially unimpeached.

I have the honor to be, very respectfully,

GEO. H. WILLIAMS.

Hon. C. DELANO,
Secretary of the Interior.

 ADDITIONAL BOUNTY.

Where a soldier was enlisted in the Army as a volunteer in December, 1861, for three years, but afterward, and before the expiration of his term of enlistment, was voluntarily transferred to the naval service, in which he served out the remainder of his term: *Held* that he is not entitled to the additional bounty provided by the act of July 28, 1866, chap. 296.

DEPARTMENT OF JUSTICE,

April 23, 1873.

SIR: It appears from the inclosures in your letter of April 9, 1873, regarding the application for bounty of Andrew I. Knowland, of Massachusetts, that on the 21st day of December, 1861, Knowland enlisted in the Fourteenth Regiment of Massachusetts Infantry; on the 4th day of May, 1864, he was transferred to the Navy, serving out the remainder of his enlistment in that service. He now asks for the additional bounty under the act of the 28th of July, 1866.

Additional Bounty.

Section 7 of an act to amend an act entitled "An act for enrolling and calling out the national forces," approved February 24, 1864, (13 Stat., 7,) provides: "Any person now in the military service of the United States who shall furnish satisfactory proof that he is a mariner by vocation, or an able seaman, or ordinary seaman, may *enlist* in the Navy, under such rules and regulations as may be prescribed by the President of the United States." On the 24th February, 1864, a resolution relative to the transfer of persons in the military service to the naval service was adopted, (13 Stat., 402,) giving the President power to direct the transfer of persons from the land service to the naval service of the United States whenever, in his opinion, the public service required it. On the 4th of March, 1864, General Order No. 91 was issued by the Secretary of War, declaring the regulations prescribed by the President to carry section 7 of the act of February 24, 1864, into effect, and which provides for a transfer upon the application of the soldier. Knowland must have received his transfer and enlisted in the Navy under this order and the provisions of this act. Upon his being received into the Navy, his name was dropped from the roll of the Army as transferred to the Navy by enlistment. The facts in this case, taken in connection with said order, show that Knowland voluntarily severed his connection with the Army of the United States before his term of enlistment expired, and consequently was dropped from the rolls of the Army and enlisted in the Navy.

Section 12 of the law of July 28, 1866, (14 Stat., 322,) provides, "That each and every soldier who enlisted in the Army of the United States after the 19th day of April, 1861, for a period of not less than three years, and, having served the time of his enlistment, has been honorably discharged, and who has received, or who is entitled to receive, from the United States, under existing laws, a bounty of one hundred dollars and no more, * * * shall be paid the additional bounty of one hundred dollars."

Two conditions are prominent in considering this section: first, that the soldier must have enlisted after the 19th day of April, 1861; second, that he must serve the full term of his enlistment.

Government Asylum for the Insane.

The soldier enlists in the Army of the United States for three years. Service in the Navy cannot be considered service under that enlistment. To bring himself within the language of section 12 of the law of July 28, 1866, he must not only have enlisted after April 19, 1861, but must also have enlisted for three years, and have served out the full time of three years in the Army of the United States. In this case, Knowland did not serve his full term of enlistment, but did *voluntarily* sever his connection with the Army before his time of service expired, and enlisted in the Navy.

My construction of the law is, that, under the statement of facts in the case before me, Knowland is not entitled to the benefit of the additional one hundred dollars bounty.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. WM. A. RICHARDSON,
Secretary of the Treasury.

GOVERNMENT ASYLUM FOR THE INSANE.

Volunteer soldiers who have become insane within a period of more than three years after their discharge from service may be admitted to the Government Asylum for the Insane in the District of Columbia, whether at the time they became insane they were inmates of any volunteer soldiers' asylum or not.

DEPARTMENT OF JUSTICE,
April 23, 1873.

SIR: I have the honor to acknowledge the receipt of a communication from the Secretary of War, of date March 8, 1873, in which he asks for my opinion as to the legality of admitting to the Government Asylum for the Insane the following classes of persons: first, volunteers duly discharged from the service, who have been inmates of the volunteer soldiers' asylum, and who have become insane there within a period of more than three years after they were discharged from the service; second, discharged volunteers, who have in like manner become insane without having been at a soldiers' asylum; or, in other words, whether a volunteer who becomes insane more than three years after discharge is entitled to admission, and whether his being an inmate of the volunteer asylum when he becomes insane makes any difference in the decision.

Government Asylum for the Insane.

To answer this question, it is only necessary to consider the act of July 13, 1866, (14 Stat., 93,) and the effect thereon of a clause in the appropriation bills of 1869 and subsequent years in these words: "For the support, clothing, medical and moral treatment of the insane of the Army, Navy, revenue-cutter, and volunteer service, who may have become insane since their entry into the service of the United States, and of the indigent insane of the District of Columbia, in the Government Hospital for the Insane, including \$500 for books, stationery, and incidental expenses, \$90,500." (15 Stat., 310.)

The act of 1866, referred to, provides that the following classes of persons, under the following circumstances, shall be entitled to admission to said asylum on the order of the Secretary of War if in the Army, or the Secretary of the Navy if in the Navy, to wit: first, men who, while in the service of the United States, in the Army and Navy, have been admitted to said asylum, and have been thereafter discharged therefrom on the supposition that they have recovered their reason, and have within three years after their discharge become again insane from causes existing at the time of such discharge, but have no adequate means of support; second, indigent insane persons who have been in the same service, and have been discharged therefrom on account of disability arising from such insanity; third, indigent insane persons, who have become insane within three years after discharge from such service, from causes which arose during, and were produced by, said service.

Prior to the year 1869 there was no express provision made for the insane of the volunteer service; but they were included by general words in the classes of persons to whom the privileges of the asylum were extended by the act of 1866. The following is the description of the persons of the third class in that act: Indigent insane persons, who have become insane within three years after discharge from such service, from causes which arose during, and were produced by, said service.

Some time in the year 1865 the volunteers were mustered out of service, and in 1869 they had ceased to be a part of said third class, except as to those who had become insane within three years after their discharge from the Army. There was

Claim for use of Turnpike during the Rebellion.

then, in 1869, no provision for those who had been volunteers and who might subsequently have become insane. In the appropriation bill of that year, after the usual words extending the benefits of the asylum to the insane of the Army, Navy, and revenue-cutter service, these words were inserted: "and volunteer service, who may have become insane since their entry into the service of the United States." Provision is here expressly made for the insane of the volunteer service, and is extended to all who may have become insane since their entry into the service of the United States.

To hold that this applies only to those who had become insane within the three years after they were mustered out of service, would be to give the words no effect; for provision had already been made for such persons. I cannot discover what the object of Congress could have been in the above-cited clause from the appropriation bills, if it was not intended that indigent persons who had been volunteers during the rebellion, and who had become insane after their enlistment, should, in consideration of their services to the country and their misfortunes, be taken care of at the Government Asylum. To give the above-named provision such a meaning certainly accords with reason and justice.

I am, therefore, of the opinion that it is legal to admit to the Government Asylum for the Insane the persons in the classes described in the above-named communication from the Secretary of War.

Very respectfully,

GEO. H. WILLIAMS.

Hon. GEO. M. ROBESON,

Acting Secretary of War.

CLAIM FOR USE OF TURNPIKE DURING THE REBELLION.

Where an alleged oral agreement between a quartermaster and the Danville, Lancaster and Nicholasville Turnpike Company, concerning the use of the road of the latter for military transportation during the late rebellion, was set up by said company as the basis of a rate of compensation above what had already been allowed by the Government for the use of the road: *Held* that, under the operation of the 1st section of the act of June 2, 1862, chap. 93, such agreement was not obligatory upon the Government, and could not be admitted as the foundation of a claim upon it.

Claim for use of Turnpike during the Rebellion.

DEPARTMENT OF JUSTICE,

May 5, 1873.

SIR: Your communication of the 7th of February transmitted for my examination numerous papers connected with the claim of the Danville, Lancaster and Nicholasville Turnpike Company (Kentucky) to be paid the proportion of tolls withheld upon settlement for the use of its road for military transportation during the late war, with a request for my opinion as to certain questions arising thereon.

The points in the history of the matter, as gathered from the papers and necessary to be stated here, are briefly as follows: On the 11th of May, 1863, an order of the Quartermaster-General was published for the guidance of the disbursing officers of his Department, prescribing the mode of settling the accounts of turnpike and bridge companies against the Government, and directing the payment of "only one-half of the ordinary tolls."

This order being observed in all settlements made with this company, (the company, it is alleged, always protesting,) claim is now made for the fifty per cent. of tolls withheld.

This claim was first presented to the Third Auditor of the Treasury in 1867. In November of that year it was referred by that officer to the Quartermaster-General, who returned it to the Auditor with the recommendation that it be rejected. It was then reported by the Auditor to the Second Comptroller, with the like recommendation. The papers, having been subsequently referred to the Secretary of War, were submitted by him to the Hon. E. R. Hoar, Attorney-General, for his opinion as to the legal obligation of the Government in the premises, and on the 22d of June, 1869, he rendered an elaborate opinion, and advised that the claim be disallowed. (See 13 Opin., 107.) When that opinion was rendered it had not been alleged that there was any arrangement or contract relative to the payment of tolls.

On the 6th of July, 1869, Quartermaster Hall made an affidavit, to the effect that he had, previous to the receipt of the Quartermaster-General's order, above mentioned, entered into a verbal arrangement or contract with J. H. Smith, superintendent of the road, with the approval of General Burnside,

Claim for use of Turnpike during the Rebellion.

the department commander, by which it was agreed that, in consideration of the exception by the company of a certain class of subjects of toll, full tolls should be paid for all other transportation. On the 19th of October, 1869, he made another affidavit, in more particular terms, to the same effect. Upon this evidence the case was again prepared for settlement, and is now referred by you for opinion: (1) as to the question whether the alleged contract is binding upon the United States; and (2) what is the effect of the vouchers issued for the tolls incurred for Government transportation.

The 1st section of the act of June 2, 1862, (12 Stat., 411,) entitled "An act to prevent and punish fraud on the part of officers intrusted with the making of contracts for the Government," requires that all contracts made by the Secretary of War, Secretary of the Navy, or the Secretary of the Interior, or by the officers under them appointed to make such contracts, shall be in writing, with the names of the parties thereto signed at the end thereof. This provision has been construed by the Court of Claims (*Henderson's Case*, 4 N. & H., 75) to be mandatory and binding, as well on the contractor as upon the officer with whom he enters into contract; and that contracts not in writing, made by either of the above-named Secretaries or by their officers, do not bind the Government, but are void.

The facts in this case show the necessity and value of the above-cited provision of law.

This claim, as first presented, was for compensation to the company according to the established rates of toll, and there was then no pretense that there was any contract or understanding upon the subject. The claim in this form was litigated before the War and Treasury Departments, and finally was referred to the Attorney-General, who decided, in effect, that as there was no contract between the parties, the Government had a right to determine for itself what was the reasonable compensation to the company for the use of its road. Then, it seems, it was discovered that there was a verbal contract between the Quartermaster's Office and the company, which is evidenced by the affidavit of that officer. I do not think the Government is bound by or ought to recognize this alleged contract.

Case of Lieutenant B. S. Humphrey.

In regard to the effect of vouchers issued in favor of claimant by the quartermaster, I have to say, that vouchers given by an officer of the Government to a party who has rendered service or furnished supplies to the Government, are *prima facie* evidence of indebtedness for such service or supplies, but are not in any sense contracts.

The case, then, stands as it did when the opinion of my predecessor was rendered, and I do not perceive any sufficient reason for recommending, in opposition to that opinion, any further or other action concerning the matter than that hitherto had in the Treasury and War Departments. If there are any equities in the case entitling claimant to relief, such relief, it appears to me, should be sought by application to Congress.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,

Secretary of War.

CASE OF LIEUTENANT B. S. HUMPHREY.

Where an Army officer was mustered out of service with one year's pay and allowances, under the 3d section of the act of July 15, 1870, chap. 29 4, and, in about two years afterward, was re-appointed to an office in the Army: *Held* that there was no authority to compel him to refund such pay and allowances, and that the same could not be legally retained out of his pay.

DEPARTMENT OF JUSTICE,

May 6, 1873.

SIR: Your letter of the 24th ultimo, relative to the case of Lieutenant B. S. Humphrey, United States Army, presents the following statement of facts:

That, being a first lieutenant in the Army, he was mustered out of service with one year's pay and allowances, under the 3d section of the act of July 15, 1870, (16 Stat., 317,) and about two years afterward was appointed a second lieutenant, and his nomination was confirmed by the Senate. In his letter of appointment, he was advised as follows: "Having drawn the year's pay and allowances, under the act of July 15, 1870, when you were mustered out of service as first

Case of Lieutenant B. S. Humphrey.

lieutenant First Artillery, the Paymaster-General has been instructed to allow you fifty per cent. of your pay from time to time, and to stop the remainder against you until the amount thus drawn is refunded." The War Department holds that this was a condition annexed to the appointment, and that, in accepting the appointment, Lieutenant Humphrey assented to and became bound by the condition.

Upon this statement, the questions which you submit for my opinion are, "whether there is any authority of law requiring or authorizing this condition, and whether the Department can legally compel repayment by a stoppage of the officer's pay."

Section 2 of the act of July 15, 1870, provides for the reduction of the number of enlisted men in the Army to thirty thousand.

Section 3 provides, "That the President be, and he is hereby, authorized, at his discretion, honorably to discharge from the service of the United States, officers of the Army who may apply therefor on or before the first of January next, and such officers so discharged under the provisions of this act shall be entitled to receive, in addition to the pay and allowances due them at the date of their discharge, one year's pay and allowances."

It is obvious that Congress, while ordering this reduction of the Army, desired to inflict as little as possible of inconvenience or hardship upon commissioned officers. Many of these had, during the war, rendered gallant and valuable service to the country. If suddenly discharged, many would be placed in a condition of embarrassment by reason of inability promptly to find employment and the means of subsistence in civil life. To those, therefore, who had been faithful and efficient, the act seems to have been designed to afford an inducement to co-operate in the reduction ordered, by providing that they should receive what might aid them to engage in civil pursuits. In this view, the officer who might avail himself of this considerate provision would not thereby be placed in the position of one receiving a mere bounty, but would be regarded rather as having received that for which the Government acknowledged the receipt of a proper consideration.

Union Pacific Railroad Bridge at Omaha.

But conjecture as to the meaning and intent of the provision is not needed. Its language is unambiguous and explicit, declaring such officers as should upon their own application be honorably discharged to be "*entitled to receive, in addition to the pay and allowances due them at the date of their discharge, one year's pay and allowances,*" thus acknowledging, in terms, the additional pay provided for as a debt, to be accounted due upon their discharge, in consideration of their voluntary retirement from the service. And all officers discharged in pursuance of this provision were remitted to civil life, free from all obligation to the Government other than such as concerns every citizen. No condition except that of honorable discharge is prescribed by it, and there is nothing in it indicating that such officers should not thereafter be eligible to any office, civil or military, no matter how great might be its emoluments, unless what had been thus received should first be refunded.

Since, therefore, the officer whose case is now in question is not required by the act referred to, nor by any other, so far as I am aware, to refund the amount of the one year's pay and allowances received by him upon his discharge from the service, in 1871, as a condition-precedent to his second appointment, I do not apprehend whence the War Department derives authority to impose such condition, and must conclude that its payment cannot lawfully be enforced. As a condition it is void and of no effect.

The papers which accompanied your letter are herewith inclosed.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. GEO. M. ROBESON,

Acting Secretary of War.

UNION PACIFIC RAILROAD BRIDGE AT OMAHA.

The act of July 2, 1864, chap. 216, being in express terms amendatory of the act of July 1, 1862, chap. 120, incorporating the Union Pacific Railroad Company, both these acts constitute in legal contemplation but one statute, and are to be read and construed together as such.

Union Pacific Railroad Bridge at Omaha.

Regarding them in that light, the requirement contained in the former, that "one-half of the compensation for services rendered for the Government" by that company should be applied to the payment of the bonds issued by the Government thereto, embraces not only railroad and telegraph service, but bridge service also.

The 2d section of the act of March 3, 1873, chap. 266, extends to the road of the same company over the bridge at Omaha; and when the circumstances exist which bring it into operation—viz, payment of interest by the Government and failure to re-imburse by the company—all compensation on account of freight and transportation over the bridge is to be withheld; but when those circumstances do not exist, the provision in the act of 1864, requiring a reservation of one-half compensation, becomes applicable to such service.

Accordingly, one-half of the compensation for transportation performed for the Government by said company over its bridge at Omaha should be withheld and applied to the payment of the bonds issued by the Government to the company, except in the case provided for by the 2d section of the act of 1873, when all compensation for such service must be withheld.

DEPARTMENT OF JUSTICE,

May 8, 1873.

SIR: I have examined the communication of the Quartermaster-General, and other papers, which accompanied your letter of the 10th of October last, in regard to transportation performed for the Government over the bridge built by the Union Pacific Railroad Company across the Missouri River at Omaha. I understand the question presented for my opinion to be, whether one-half of the compensation for such service is required by existing laws to be applied to the payment of the bonds issued by the Government to said company in aid of the construction of its road and telegraph.

I find from the papers transmitted that this question is supposed to involve the inquiry whether the eastern terminus of the Union Pacific Railroad is fixed by law on the Nebraska or on the Iowa side of the Missouri River; and very elaborate arguments have been prepared and submitted to me, directed mainly to the discussion of that subject. These arguments proceed, on the one hand, upon the idea that if the initial point of that railroad, as fixed by law, is located in Iowa, the railroad belonging to said company which crosses the Missouri River on the aforesaid bridge must be deemed a part of the Union Pacific Railroad, and therefore within the statutory provisions hereinafter mentioned concerning compensa-

Union Pacific Railroad Bridge at Omaha.

tion for services performed for the Government; and on the other hand, that if the location of the initial point, as so fixed, is in Nebraska, the railroad laid upon the bridge, being thus no part of the Union Pacific Railroad, cannot be regarded as properly within those provisions. I am satisfied, however, that a proper solution of the question submitted may be reached without passing upon the subject just adverted to, and the views which I have now the honor to communicate touching that question rest on grounds wholly independent of the locality of the said terminus—that is, as to whether it is on the east or west side of the Missouri River.

The 6th section of the act of July 1, 1862, (12 Stat., 493,) incorporating the Union Pacific Railroad Company, provided, among other things, that “all compensation for services rendered for the Government” by said company should be applied to the payment of the bonds issued by the Government to the company until the same are fully paid.

The 5th section of the amendatory act of July 2, 1864, (13 Stat., 359,) required only one-half of the compensation for services rendered for the Government by the company to be applied to the payment of said bonds; and by the 9th section of this act authority was given the company to build a bridge across the Missouri River for the convenience of its road.

By the act of February 24, 1871, (16 Stat., 430,) the company was authorized to issue such bonds, and secure the same by mortgage on the bridge and approaches and appurtenances, as it may deem needful to construct and maintain its bridge over said river, and the tracks and depots required to perfect the same, as then authorized by act of Congress. This act furthermore provided that “said bridge may be so constructed as to provide for the passage of ordinary vehicles and travel, and said company may levy and collect tolls and charges for the use of the same; and for the use and protection of said bridge and property, the Union Pacific Railway Company shall be empowered, governed, and limited by the provisions of the act entitled ‘An act to authorize the construction of certain bridges, and to establish them as post-roads,’” approved July 25, 1866, so far as the same is applicable thereto.

Union Pacific Railroad Bridge at Omaha.

Among the provisions of the act of July 25, 1866, which seem to be applicable to the *use* of the said bridge, is the provision in the 1st section, to the effect that when the bridge is constructed all trains of all roads terminating at either side of the river shall be allowed to cross the bridge for reasonable compensation to be made to its owners, under the limitations and conditions thereafter provided; and also the following provision in the 3d section, that "no higher charge shall be made for the transmission over the same of the mails, the troops, and the munitions of war of the United States than the rate per mile paid for their transportation over the railroads or public highways leading to the said bridge."

From the foregoing it appears that under the act of February 24, 1871, and the provisions of the act of July 25, 1866, thereby adopted, the privilege of crossing the bridge with their trains is secured to other railroad companies besides the Union Pacific Company, for reasonable compensation to be made to the latter. I do not understand, however, that the question presented to me relates to transportation which may be performed by such other companies over the bridge, but only to service of that kind rendered by the Union Pacific Company.

I shall, in the first place, consider the above-mentioned acts of 1862 and 1864. The latter act being, in express terms, amendatory of the former, both acts constitute, in legal contemplation, but one statute, and are to be read and construed together as such; that is to say, the act of 1862 should be read exactly as it would stand with all the amendments made by the act of 1864, whether consisting in the modification of former provisions or in the addition of new ones, introduced in their appropriate places in the body thereof or subjoined thereto, and should be construed precisely as if it had been originally so framed and enacted, in determining the scope and operation of the entire law and of each provision thereof subsequent to the date of the amendatory act. (See *McKibben vs. Lester*, 9 Ohio Stat., 627; *Plank-road Company vs. Allen* 16 Barb., 17; *Holbrook vs. Nichol et al.*, 36 Ill., 167.)

Regarding these acts in this light, the inquiry naturally arises, what is the effect of the provision requiring one-half of the compensation for services rendered for the Government

Union Pacific Railroad Bridge at Omaha.

by said company to be applied to the payment of the bonds hereinbefore mentioned? It is conceded that this provision embraces service rendered by the company in performing transportation for the Government over the railroad, and in transmitting dispatches for the Government over the line of telegraph mentioned in the statute. But does it likewise embrace service rendered by the company for the Government in performing transportation over the bridge also mentioned in the same statute? for it should be borne in mind that the amended act and the amendatory act are to be viewed as *one statute*.

In examining this point, I shall assume, for present purposes, that the bridge is erected under a franchise distinct and separate from that of the road; in short, that the bridge is not a part of the road. This being the position taken by the company respecting the state or condition of the bridge, under the law, the assumption cannot be regarded by it as wanting in fairness.

It will be observed that there is nothing in the provision itself which limits its application to any particular service. The language employed is very general and comprehensive in its character. Under the act of 1862, as it stood before the amendments thereof introduced by the act of 1864, the provision under consideration, which then required "all compensation" for services rendered for the Government by the company to be devoted to the payment of the bonds, was necessarily restricted to service performed over the railroad and over the telegraph; for at that time the franchises granted to the company were confined to those authorizing the construction and maintenance of a railroad and telegraph, the bridge franchise having as yet no existence; and it is to be presumed that no service was contemplated by the act except such as should be performed under or by means of the franchises granted, or at least expressly mentioned, therein. But the original charter of the company was in many respects enlarged by the act of 1864, and among other powers then conferred upon the company was the authority to build the bridge referred to, which it is claimed constituted the grant of an additional franchise. At the same time the provision as to compensation for service rendered by the company for the Gov-

Union Pacif c Railroad Bridge at Omaha.

ernment was altered so as to require "only one-half" to be applied to the payment of the bonds; but the general and comprehensive terms as to the nature or extent of such service were retained. Thus enlarged, the charter (as is here assumed) contained three franchises, the railroad, telegraph, and bridge; and the provision mentioned can no longer with propriety be considered as *necessarily* restricted in its application to the two former, but, for aught that appears in the phraseology employed, may fairly be taken to extend to and include service that might be performed by the company over the bridge then authorized to be constructed, as well as service that might be performed over the railroad or telegraph named in the original act.

Such being the scope of the provision as to compensation, when viewed according to the import of the language employed therein, I think it should be regarded as having a corresponding effect, and as embracing bridge service equally with railroad and telegraph service, unless an intention on the part of Congress to limit its application to the latter kind of service clearly appears.

Counsel in behalf of the company urge that the services which the Government might require from the company, as defined by section 6 of the act of 1862, were the transmission of dispatches over the telegraph, and the transportation of mails, troops, and munitions of war, supplies, and public stores upon the railroad; that the clause "all compensation for services rendered for the Government," &c., used in the same section, refers to the services just mentioned, being those which were required by the act; that this clause was modified by section 5 of the act of 1864 in one respect only, viz, by a reduction of the amount to be retained from the whole to one-half; and that had there been any intention to extend its application to service not before included, that intention would have found expression in the latter act in unequivocal language.

To this it may be answered that as the clause in question does not expressly mention or refer to services of a particular character, it cannot, *ex propriis terminis*, be regarded as limited in its application to such services; that prior to the act of 1864 it was of necessity restricted to the telegraph and rail-

Union Pacific Railroad Bridge at Omaha.

road service mentioned, on grounds hereinbefore stated ; that its language is of itself sufficiently broad and comprehensive to include service which may be rendered for the Government over the bridge authorized to be erected by that act, and consequently nothing further was needed to make it applicable thereto ; whereas, to give it the limited operation contended for, some restraining term or other provision indicative of such a purpose would have been necessary ; and, accordingly, that unless an intention to narrow its scope and restrict its application simply to railroad and telegraph service is distinctly manifested in the act, such an intention is not to be inferred, but rather the contrary must be presumed.

It is further urged, in behalf of the company, that the application of the provision under consideration to the bridge is in conflict with the spirit of the Pacific Railroad acts ; that the theory of this legislation was, that the property which was created by the Government subsidies should alone contribute to the payment of the obligations so incurred in its behalf ; that the railroad and telegraph, having been to a large extent built from such subsidies, are properly subject to thus contribute, but that it is otherwise with the bridge, as the Government gave nothing and loaned nothing to aid in the construction thereof.

I do not concur in this view of the statute. The 5th section of the act of 1862, granting a subsidy in bonds, provided that this section should not apply to "that part of any road then constructed ;" but it cannot be doubted that the other provision of the act, relating to compensation for services rendered for the Government, extended as well to that part of any road excepted from the subsidy as to that portion of the same road to which the grant applied.

This point was indeed considered by Mr. Attorney-General Akerman, in an opinion dated December 9, 1870, in connection with the subject of the transportation of the mails over the Kansas Pacific Railroad, part of which road had not been allowed any subsidy in bonds ; and his conclusion was that the provision embraced the entire road, the part not subsidized equally with the part subsidized. (See 13 Opin., 351.) This opinion would seem to be an authority against the view of the statute taken by the company ; since the part of the

Union Pacific Railroad Bridge at Omaha.

road mentioned for which no subsidy was granted, and the bridge, occupy the same relation to the question under consideration.

I cannot discover anything in the statute indicative of an intention to limit the application of the provision concerning compensation to the railroad and telegraph because these were directly aided by subsidy, and to exclude the bridge because it was not so aided, any more than I can see an intention to confine that provision to such part of any railroad named therein as directly participated in the subsidy granted, to the exclusion of so much of the road as was not thus favored.

That provision is not to be regarded as simply a burden imposed, but as a measure looking to the satisfaction of an indebtedness or the discharge of a liability incurred. This liability is the payment of the principal and interest of the bonds issued by the Government to the company. Of similar character is the provision, in the same section, that, until the said bonds and interest are paid, five per cent. of the net earnings of the *road* shall be annually applied to the payment thereof. It is significant that, while the reservation of five per cent. of the net earnings is in terms restricted to particular earnings, the reservation of one-half compensation for services is not in terms restricted to particular services. The inference is that the latter was intended to have a general application, and to include service rendered by means of any or all of the various agencies referred to in the statute—the telegraph, railroad, and bridge.

Thus I arrive at the conclusion that, under the acts of 1862 and 1864, read and construed together as one statute, the requirement that "one-half of the compensation for services rendered for the Government" by said company shall be applied to the payment of the bonds issued thereto embraces not only railroad and telegraph service, but bridge service also.

By reference to the act of February 24, 1871, above cited, it will be perceived that this statute makes no alteration in the law as regards the reservation of one-half of the compensation for services rendered by the company over the

Union Pacific Railroad Bridge at Omaha.

bridge, but leaves the provision relating to that subject just as it stands under the acts of 1862 and 1864.

Since the reference of the matter under consideration to this Department, some further legislation has been adopted which should be noticed in this connection.

The 2d section of the recent act of March 3, 1873, making appropriations for the legislative, executive, and judicial expenses of the Government, provides, "That the Secretary of the Treasury is directed to withhold all payments to any railroad company and its assigns, on account of freights or transportation over their respective *roads of any kind*, to the amount of payments made by the United States for interest upon bonds of the United States issued to any such company, and which shall not have been re-imbursed, together with the five per cent. of net earnings due and unapplied, as provided by law."

This enactment takes effect whensoever any interest, paid by the Government upon its bonds issued to the company, is not re-imbursed by the latter. In that event, all payments on account of freight or transportation over "any kind" of a road belonging to the company are, in express terms, directed to be withheld. Now, the track used by the company for running its cars across the Missouri River at Omaha is not the less a road because the structure upon which it rests is a bridge; and, as I conceive, it may reasonably be taken to be within the very broad and general provision just quoted, whether it and the bridge on which it is laid were or were not constructed under a franchise distinct from that under which the remainder of the company's road was built.

Practically, then, this provision extends to the railroad and the bridge, but not to the telegraph, the latter not being mentioned or otherwise included therein. So that, when the circumstances exist which bring it into operation, viz, payment of interest by the Government and failure to re-imburse by the company, all compensation on account of freight and transportation, over both railroad and bridge, is to be withheld. When those circumstances do not exist, the provision in the acts of 1862 and 1864, requiring a reservation of one-half compensation, becomes applicable to such services.

Upon the general question submitted, I have therefore to

Deputy Collector of Customs at San Francisco.

say that, in my opinion, one-half of the compensation for transportation performed for the Government by the Union Pacific Railroad Company over the bridge of that company at Omaha is required by existing laws to be applied to the payment of the bonds issued by the Government to the company, except in the case provided for in the 2d section of the act of March 3, 1873, when all compensation for such service must be withheld.

The papers received with your letter are herewith returned.

I have the honor to be, very-respectfully,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP

Secretary of War.

DEPUTY COLLECTOR OF CUSTOMS AT SAN FRANCISCO.

Meaning of the *proviso* in section 4 of the act of July 28, 1866, chap. 293, declaring that "the additional compensation of twenty-five per centum, as now provided by law, shall be continued to officers as aforesaid [*i. e.*, deputy collectors] at the port of San Francisco," explained.

Under that enactment, the deputy collector of customs at San Francisco is absolutely entitled to such additional compensation, and the Secretary of the Treasury cannot, in his discretion, disallow the same.

DEPARTMENT OF JUSTICE,

May 20, 1873.

SIR: Your communication of the 27th ultimo, touching the claim of L. M. Kellogg, deputy collector of customs at the port of San Francisco, California, submits for my opinion the following question: "Whether the Secretary of the Treasury has a *discretionary power*, under section 4, act of July 28, 1866, chap. 293, to allow or disallow the 'additional compensation' therein mentioned; or whether Congress intended by its legislation on that subject to make a permanent discrimination to the extent of six hundred and twenty-five dollars per annum in favor of deputy collectors at San Francisco, as compared with officers of the like grade at New York."

Section 4 of the act of July 28, 1866, to which reference is made in the question submitted, enacts as follows: "That in lieu of the compensation now allowed by law, there shall hereafter be paid to each of the deputy collectors at the ports

Deputy Collector of Customs at San Francisco.

of New York, Boston, Philadelphia, Baltimore, New Orleans, Portland, and San Francisco, * * * three thousand dollars per annum, * * * out of the appropriations for expenses of collecting the revenue from customs: *Provided*, That the additional compensation of twenty-five per centum, as now provided by law, shall be continued to officers as aforesaid at the port of San Francisco." And the question appears to turn on the proper construction of the *proviso* in this section.

The "additional compensation of twenty-five per centum," mentioned in that proviso, is understood to refer to the provision as to compensation contained in the 5th section of the act of July 14, 1858, (11 Stat., 337,) which reads thus: "That no collector of customs, deputy collector, naval officer, deputy naval officer, surveyor, deputy surveyor, general appraiser, superintendent of warehouses, or appraiser shall receive a compensation more than twenty-five per cent. greater than is now paid to the officers and persons engaged in said service at the port of New York: *Provided*, That this section shall not be so construed as to increase the compensation of any officer of the customs or of any person engaged in the collection thereof."

At the date of the passage of the act of 1858, the officers named in the section just quoted, who were then serving at the port of San Francisco, received salaries very much above the limit fixed in that section, and the design of Congress was to reduce these salaries. In carrying this design into effect, the rates of compensation then received by the same class of officers at the port of New York were taken as a basis for regulating the compensation of the former officers, and upon these rates an addition of twenty-five per cent. in favor of those officers was authorized, but no more. Thus the pay of the deputy collector at San Francisco, who previously received a salary of \$4,000 per annum, was thereafter not to exceed \$3,125 per annum, this being equal to the compensation of the deputy collector at New York, (\$2,500 per annum,) and an addition of twenty-five per cent. thereon, (\$625.)

Accordingly, when viewed with reference to the previous compensation of the deputy collector at San Francisco, the provision of the act of 1858 referred to necessarily effected

Deputy Collector of Customs at San Francisco.

a reduction of nearly twenty-five per cent. in his salary; but when viewed with reference to the rate of compensation adopted as a basis for regulating his pay, viz, that received by the deputy collector at New York, the same provision allowed him to receive an additional compensation of twenty-five per cent. on and above that rate. It is in the latter respect that that provision is contemplated by the 4th section of the act of July 28, 1866, in the following phraseology there employed, viz, "the additional compensation of twenty-five per centum," &c.

Hence, as regards the deputy collector at San Francisco, the proviso in that section may with propriety be read thus: "That the additional compensation of six hundred and twenty-five dollars, as now provided by law, shall be continued" to that officer.

Whether the allowance of this additional compensation of six hundred and twenty-five dollars per annum is or is not discretionary with the Secretary of the Treasury, remains to be considered.

The language of the proviso is that it "shall be continued" to the officer. These terms import an assumption on the part of Congress that the officer was then in actual receipt of such additional compensation, which, however, whether correct or incorrect, is entirely immaterial, as the *intention* of the legislature can alone be regarded, and *that* would seem to have been this, that the amount named in the proviso should thereafter be allowed to the officer besides the three thousand dollars antecedently mentioned in the statute.

Taken according to its ordinary signification, the language above quoted is imperative in its character, and does not admit of the exercise of any discretion by the head of the Department respecting the allowance. But it is suggested that the clause in the proviso "as now provided by law" amounts to a qualification of the terms "shall be continued," &c.; and that, as the Secretary of the Treasury previously exercised a discretion, under the law referred to in that clause, in regard to the compensation of the deputy collector at San Francisco, those terms must be understood to mean that the additional compensation is to be continued, subject to the same discretion.

Fort Reading, California.

I think the clause mentioned is referable to what precedes and not to what follows it, and is descriptive of the amount of the additional allowance intended, rather than of the mode of such allowance. The circumstance that the additional compensation authorized is a sum certain and specific affords a strong presumption that no discretion was meant to be exercised by the Secretary as to the amount of the allowance; while the circumstance that the terms by which such additional compensation is allowed are, as already observed, imperative in their character, affords an equally strong presumption that Congress did not intend that he should exercise any discretion as to the propriety or expediency of the allowance.

From these considerations I am led to the conclusion, which I have now the honor to state in answer to your question, that the Secretary of the Treasury has no discretionary power to allow or disallow the additional compensation mentioned, and that the deputy collector at San Francisco is, under the proviso referred to, absolutely entitled to such compensation.

The papers which accompanied your communication are herewith returned.

I am, sir, very respectfully, your obedient servant,
GEO. H. WILLIAMS.

Hon. WM. A. RICHARDSON,
Secretary of the Treasury.

FORT READING, CALIFORNIA.

The military post of Fort Reading, in California, is within the operation of the 6th section of the act of June 12, 1858, chap. 156, reserving from sale or pre-emption lands that belong to useless military sites until otherwise ordered by Congress.

DEPARTMENT OF JUSTICE,
May 24, 1873.

SIR: From the letter of the acting Secretary of War of the 24th ultimo, and its inclosures, relative to the military post of Fort Reading, California, it appears that the post was established May 26, 1852, and garrisoned until April 1, 1856, when the troops were withdrawn, and that from the

Fort Reading, California.

latter date until June 13, 1867, it was occupied but a few months; and without further occupation by troops, was finally abandoned on the 6th of April, 1870, when the buildings pertaining to it were sold in pursuance of an order of the Secretary of War, of which abandonment notice was duly communicated to the General Land-Office.

It further appears that no record can be found of any order of the President reserving lands for military purposes at this post, or that a reservation was ever in any way formally declared. It does not appear what extent of land was actually occupied and used; whether only so much as was embraced within the lines of the work, or a larger tract.

The 6th section of an act approved June 12, 1858, (11 Stat., 336,) provides (with an exception of certain reservations in the State of Florida) for the repeal of "all the existing laws or parts of laws which authorize the sale of military sites which are or may become useless for military purposes," and that "said lands shall not be subject to sale or pre-emption under any of the laws of the United States;" and it is asked whether the facts above stated "are sufficient to constitute the post mentioned a military site within the meaning of this provision, so as to require the consent of Congress prior to its relinquishment and sale."

It is added that, as there are many places occupied as military sites which, as in this instance, are such "only by occupancy," the War Department desires a rule for its guidance in such cases. Before the enactment of this provision, Congress had by the act of 1819, (3 Stat., 520,) and by various special acts, devolved upon the Secretary of War the duty of selling useless or abandoned military sites. There having been question whether the act of 1819 applied to any such sites except those undisposed of at the time of its passage, an act was passed March 3, 1857, (11 Stat., 203,) extending the provisions of the former act "to all military sites, or to such parts thereof which are or may become useless for military purposes."

Finally, in consequence of complaints as to the manner in which this authority to sell had been exercised, the provision in the act of 1858 was adopted by which all such sites are reserved from sale or pre-emption until otherwise ordered by

Fort Reading, California.

Congress. There is no discrimination in its terms as to the value, situation, or extent of the sites; it comprehends all military sites or reservations, no matter what their extent, whether embraced within the actual lines of a post or fort, or including in addition more or less of the surrounding lands.

In *Wilcox vs. Jackson* (13 Peters, 513) it is held "that whenever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus severed becomes severed from the mass of public lands, and that no subsequent law or proclamation would be construed to embrace it or to operate upon it, although no reservation were made of it."

Attorney-General Bates, in the case of the Rock Island military reservation, (10 Opin., 365,) decides that it was not in the power of the President to relinquish that reservation, and thus throw the island back into the general body of the public lands, without the consent of Congress.

So far as concerns military posts in the State of California, a clause in the 7th section of the act of March 3, 1853, entitled "An act to provide for the survey of public lands," &c., (10 Stat., 247,) rendered the reservation of land outside of the lines of a fort or post by executive authority unnecessary. The clause reads as follows: "And no person shall make a settlement or location upon any tract or parcel of land selected for a military post or within one mile of such post."

This provision in the act of 1853 would seem to leave no room for controversy as to Fort Reading. All settlements and locations by private parties are excluded, not only from what is properly the military post, but from all land within one mile of it.

My opinion, therefore, is that Fort Reading is of that character of military sites contemplated in the 6th section of the act of June 12, 1858, and that the consent of Congress is necessary to its relinquishment and sale.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,
Secretary of War.

Case of B. C. Whiting.

CASE OF B. C. WHITING.

Where an officer in the civil service of the Government, after having been suspended by the President under the tenure-of-office act of April 5, 1869, chap. 10, was afterward restored to duty, and who, during the period of his suspension, had been employed in settling up his affairs with the Government: *Held* that he could under no circumstances whatever be allowed the salary of the office for the period of his suspension; the statute expressly declaring that no part of such salary shall belong to the suspended officer.

DEPARTMENT OF JUSTICE,

May 31, 1873.

SIR: I have the honor to acknowledge the receipt of your letter of the 27th of February last, inclosing a communication from B. C. Whiting, esq., superintendent of Indian affairs for California, in which he claims his salary as such superintendent during a period of suspension, and while, as he alleges, he was settling his accounts with the office of Commissioner of Indian Affairs, and you inquire whether or not the claim is a valid one.

I should have answered sooner, but have been withholding my opinion at the suggestion of Mr. Whiting, to enable him to furnish me with a brief, which has not yet been received.

According to Mr. Whiting's statement, on the 7th of June, 1869, he was suspended by an order, of which the following is a copy:

"EXECUTIVE MANSION,

"Washington, D. C., June 7, 1869.

"You are hereby suspended from the office of superintendent of Indian affairs for the district of California, in accordance with the terms of an act approved April 5, A. D. 1869, to amend an act to regulate the tenure of certain civil offices, passed March 2, 1867, and subject to all provisions of law applicable thereto.

"U. S. GRANT.

"B. C. WHITING, Esq."

And on the 2d day of June, 1870, the above order of suspension was revoked by order of the President, and he was restored to duty. He further states that during the time of

Case of B. C. Whiting.

his suspension he was engaged in settling up his affairs with the Indian Office, and that most of his time was occupied in that way during his suspension; and he further alleges that General John B. McIntosh, an Army officer, was illegally designated by the President to act in his place between the said 7th of June, 1869, and the said 2d of June, 1870.

Section 2 of the act referred to in the President's order of suspension, (16 Stat., 6,) after providing that the President, during the recess of the Senate, may, in his discretion, suspend any civil officer and designate some suitable person to perform the duties of such suspended officer in the mean time, further provides that "such person, so designated, shall take the oaths and give the bonds required by law to be taken and given by the suspended officer, and shall, during the time he performs his duties, be entitled to the salary and emoluments of such office, *no part of which shall belong to the officer suspended.*" Whether General McIntosh was properly designated by the President to act during the suspension of Mr. Whiting or not, or whether or not he was entitled to the salary while he discharged the duties of the office, are, it seems to me, immaterial questions; for the language of the statute is clear and explicit, that no part of the salary shall belong to the officer suspended.

When Mr. Whiting was suspended by the President, reference was made to this act as the authority under which it was done, and there seems to be no room for controversy as to its application to his case, or as to its meaning and effect. No exception or qualification is made by the act, and none can be made by any executive officer of the Government on any of the grounds suggested by Mr. Whiting; and while it may be true that, for his labors during the time of his suspension, he may have an equitable claim upon the Government, it does not follow that he is entitled to his salary as superintendent of Indian affairs when he was not superintendent in fact, and when the law expressly forbids the payment of a salary to him as such officer during the time when he was not discharging the duties of the office.

My opinion, therefore, is that Mr. Whiting has no right to his salary as superintendent of Indian affairs in California from the 7th of June, 1869, until the 2d of June, 1870, the

The Modoc Indian Prisoners.

time during which he was suspended by virtue of the said order of the President.

Very respectfully,

GEO. H. WILLIAMS.

Hon. C. DELANO,

Secretary of the Interior.

THE MODOC INDIAN PRISONERS.

It is within the competency of a military commission to try such of the prisoners taken in the Modoc Indian war of 1873 as are chargeable with offenses against the recognized laws and usages of war, and, if found guilty, to subject them to the punishment which those laws and usages warrant.

DEPARTMENT OF JUSTICE,

June 7, 1873.

SIR: I have the honor to acknowledge the receipt from you of several papers relative to the Modoc Indians now in custody of the United States Army, with a request for my opinion as to the authority to try certain of the prisoners by a military tribunal.

The main facts out of which the question arises are these:

In 1864 the United States made a treaty with these Indians by the terms of which they were to go and remain upon a reservation in the State of Oregon. Late last fall, the Indians being away from their reservation, a military detachment was sent to procure their return. Finding them unwilling to go peaceably, the officer indicated his determination to use compulsion, in consequence of which a conflict ensued between United States troops and the Indians. Soon after several peaceable citizens and their families in the vicinity were murdered by Indians of this band. They then intrenched themselves in the lava-beds in the neighborhood. Fighting ensued, and one or more severe battles, in which persons on both sides were wounded and killed and the United States troops repulsed.

Pending hostilities, negotiations were opened for peace, and on the 13th of April last General Canby, Rev. Mr. Thomas, and Mr. Meacham, at a point between the opposing forces,

The Medoc Indian Prisoners.

and in pursuance of a mutual agreement to that end, met Captain Jack, the leader of the Indians, with some of his chief warriors, to discuss the terms of a treaty, and while so engaged General Canby and Mr. Thomas were treacherously assassinated and Mr. Meacham severely wounded by the Indians present upon that occasion. Battles followed, and Captain Jack and all or most of his tribe have been captured, and are now in the hands of the military authorities.

General Sherman, in a communication to the Secretary of War dated the 3d instant, recommends that such of these Indians as have violated military law be tried by a military tribunal. This recommendation is approved by the Secretary of War.

"Instructions" were prepared, in 1863, by Francis Lieber, LL. D., revised by a board of officers, of which General E. A. Hitchcock was president, and, after approval by the President of the United States, were published for the government of armies of the United States in the field. Section 13 of these "Instructions" is as follows:

"Military jurisdiction is of two kinds: first, that which is conferred and defined by statute; second, that which is derived from the common law of war. Military offenses under the statute-law must be tried in the manner therein directed; but military offenses which do not come within the statute must be tried and punished under the common law of war. The character of the courts which exercise these jurisdictions depends upon the local laws of each particular country.

"In the armies of the United States the first is exercised by courts-martial; while cases which do not come within the 'Rules and Articles of War,' or the jurisdiction conferred by statute on courts-martial, are tried by military commissions."

All the authorities which I have been able to examine upon this subject harmonize with these "Instructions."

According to the laws of war there is nothing more sacred than a flag of truce dispatched in good faith, and there can be no greater act of perfidy and treachery than the assassination of its bearers after they have been acknowledged and received by those to whom they are sent. No statute of the United States makes this act a crime, and, therefore, it is not punishable under the "Rules and Articles of War;" and

The Medoc Indian Prisoners.

if punishable at all, it must be through a power derived from the usages of war.

Kindred to the act in question in bad faith, is the breaking of his parole by a paroled prisoner. While the United States were at war with Mexico, several officers of the Mexican army were tried by a military commission composed of officers of the United States Army, convicted, and sentenced to be shot, and executed, for breaking their parole.

Numerous trials of a similar nature took place during the war of the rebellion. But there are no statutory provisions whatever upon the subject, and the whole power of the military authorities in such cases is derived from the usages of war.

On the 23d of August, 1865, a military commission duly appointed assembled in the city of Washington for the trial of Henry Wirz, who pleaded, among other things, that the military commission had no jurisdiction over either his person or over the subject-matter of the charges and specifications, being a tribunal unauthorized by either statute, military law, martial law, or well-established usage. But this plea was overruled, and he was convicted upon several charges, one of which was "murder in violation of the laws and customs of war," and after sentence he was hung for his crimes.

All the proceedings in this case derive their authority and validity from the common law of war. Certain persons, it will be remembered, were tried and convicted in the same way for the assassination of President Lincoln.

Attorney-General Speed, in discussing this subject, (11 Opin., 297,) says: "We have seen that when war comes the laws and usages of war come also, and that during the war they are a part of the laws of the land. Under the Constitution, Congress may define and punish offenses against those laws; but in default of Congress defining those laws and prescribing a punishment for their infraction, and the mode of proceeding to ascertain whether an offense has been committed, and what punishment is to be inflicted, the Army must be governed by the laws and usages of war as understood and practiced by the civilized nations of the world."

Again: "If the prisoner be a regular unoffending soldier

The Modoc Indian Prisoners.

of the opposing party to the war, he should be treated with all the courtesy and kindness consistent with his safe custody; if he has offended against the laws of war he should have such trial and be punished as the laws of war require.

"A spy, though a prisoner of war, may be tried, condemned, and executed by a military tribunal without a breach of the Constitution. A bushwhacker, a jayhawker, a bandit, a war-rebel, an assassin, being public enemies, may be tried, condemned, and executed as offenders against the laws of war." * * * "The law of nations, which is the result of the experience and wisdom of ages, has decided that jayhawkers, banditti, &c., are offenders against the laws of nature, and of war, and as such amenable to the military. Our Constitution has made those laws a part of the law of the land." (See, also, Vattel, 359; Wheaton's Int. Law, 406; Woolsey's Int. Law, 220; Halleck's Int. Law, 400.)

Milligan's Case (4 Wallace, 2) holds, under the circumstances therein stated, a military commission to be illegal. But the facts there are entirely different from those under consideration. Milligan was the resident of a State not in rebellion. The courts were open and unobstructed for his prosecution. He was neither a prisoner of war nor attached in any way to the military or naval service of the United States.

According to the "Instructions" heretofore referred to, no civil tribunal has jurisdiction in the case disclosed by the papers before me.

Sections 40 and 41 thereof are as follows:

"40. There exists no law or body of authoritative rules of action between hostile armies except that branch of the law of nature and nations which is called the law and usages of war on land.

"41. All municipal law of the ground on which the armies stand or of the countries to which they belong is silent and of no effect between armies in the field."

Manifestly, these rules to a great extent, if not altogether, are correct; for it cannot be pretended that a United States soldier is guilty of murder if he kills a public enemy in battle, which would be the case if the municipal law was in force and applicable to an act committed under such circumstances.

All the laws and customs of civilized warfare may not be

The Modoc Indian Prisoners.

applicable to an armed conflict with the Indian tribes upon our western frontier; but the circumstances attending the assassination of Canby and Thomas are such as to make their murder as much a violation of the laws of savage as of civilized warfare, and the Indians concerned in it fully understood the baseness and treachery of their act.

It is difficult to define exactly the relations of the Indian tribes to the United States; but as they have been recognized as independent communities for treaty-making purposes, and as they frequently carry on organized and protracted wars, they may properly, as it seems to me, be held subject to those rules of warfare which make a negotiation for peace after hostilities possible, and which make perfidy like that in question punishable by military authority.

Doubtless the war with the Modocs is practically ended, unless some of them should escape and renew hostilities. But it is the right of the United States, as there is no agreement for peace, to determine for themselves whether or not anything more ought to be done for the protection of the country or the punishment of crimes growing out of the war.

Section 59 of said "Instructions" is as follows: "A prisoner of war remains answerable for his crimes committed against the captor's army or people, committed before he was captured, and for which he has not been punished by his own authorities."

My conclusion, therefore, is that a military commission may be appointed to try such of the Modoc Indians now in custody as are charged with offenses against the recognized laws of war, and that if upon such trial any are found guilty they may be subjected to such punishment as those laws require or justify.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

The PRESIDENT.

Railroad-Bridges across the Mississippi River.

RAILROAD-BRIDGES ACROSS THE MISSISSIPPI RIVER.

Provisions of the acts of April 1, 1872, chap. 73, and June 4, 1872, chap. 281, relative to the location and construction of railroad-bridges across the Mississippi River, examined, and the authority of the Secretary of War in the premises stated and defined.

DEPARTMENT OF JUSTICE,*June 7, 1873.*

SIR: The Milwaukee and Saint Paul Railway Company having, under authority of an act of Congress approved April 1, 1872, (17 Stat., 41,) located their railway-bridge to cross the Mississippi River at the city of La Crosse, Wisconsin, and submitted their location, with plans of bridge, for your approval, your communication of the 16th ultimo states the following questions for opinion:

1. Does the act of June 4, 1872, confer on the Secretary of War any other authority than to inquire whether or not a bridge erected at the site chosen by the railroad company would obstruct the navigation of the river, or be inconvenient of access to other railroads?

2. In determining the question of convenience of access in respect to other railroads, whether the Secretary of War is to consider only such roads as are now constructed or in process of construction, or whether he may take into consideration any roads *contemplated* to be made; and

3. Whether the act of June 4, 1872, confers on the Secretary of War the power to locate said bridge, or can he merely approve or disapprove of the location made by the company, as provided by section 5 of the act of April 1, 1872.

The act of April 1, 1872, authorized the construction of four bridges across the Mississippi.

Its 1st section authorized the building of a bridge at such point on the river, within fifteen miles of the town of Clinton, Iowa, as might "accommodate the Chicago, Burlington and Quincy Railroad and its connections on the west side of the river," &c.

The 2d section specified the plan of the bridge; the 3d provides that it shall be a post-route; and the 4th that all railway companies desiring to use it shall have equal rights and

Railroad-Bridges across the Mississippi River.

privileges in its passage, in the use of its machinery and fixtures, and in the approaches to it, "under and upon such terms and conditions as shall be prescribed by the Secretary of War, upon hearing the allegations and proofs of the parties, in case they shall not agree."

The 5th section is as follows: "That the structure herein authorized shall be built and located under and subject to such regulations for the security of navigation of said river as the Secretary of War shall prescribe, and the said structure shall be at all times so kept and managed as to offer reasonable and proper means for the passage of vessels through or under said structure, and the said structure shall be changed at the cost and expense of the owners thereof, from time to time, as Congress may direct, so as to preserve the free and convenient navigation of said river. And the authority to erect and continue said bridge shall be subject to revocation and modification by law whenever the public good shall, in the judgment of Congress, so require, without any expense or charge to the United States."

By the 6th section, the Muscatine Western Railroad Company is authorized to build a bridge across the river *at the city of Muscatine, Iowa*; by the 7th, authority is given to the Western Union Railroad Company, or another company named, or both, to construct a bridge "*at any point they may select,*" between the counties of Carroll and Whitesides, Illinois, and the counties of Jackson and Clinton, Iowa; and by the 8th section the Milwaukee and Saint Paul Railway Company have authority to build a bridge "*at any point they may select,*" between the county of La Crosse, in the State of Wisconsin, and the county of Houston, in the State of Minnesota.

Each of the sections authorizing the building of the three last-named bridges has the following provision: "The bridge authorized to be built by this section is hereby declared to be a post-route, and has all the privileges, and is subject to all the terms, restrictions, and requirements contained in the foregoing sections of this act."

The duty prescribed to the Secretary of War in this act relates to two particulars; the more important of the two concerning the freedom and security of navigation. The bridges are to be "built and located under and subject to

Railroad-Bridges across the Mississippi River.

such regulations for the security of navigation as the Secretary of War shall prescribe;" and next, he is to see to it that all railway companies desiring to use the bridges shall have equal rights and privileges in the passage of the same, &c.

The first of these duties devolved upon the Secretary requires him to determine whether a proposed location of either of the bridges will (to use the language of the decisions relating to the subject) materially obstruct navigation; every bridge across a navigable river, no matter how carefully located or constructed, being in common understanding supposed to be in some degree obstructive to navigation. If he shall find that a bridge at the proposed location will materially obstruct navigation, upon his disapproval it will not be lawful to build a bridge at that location. He may modify the proposed location, as, for instance, by prescribing the connections of the bridge with the banks of the river, protections for the preservation of the banks, the direction of the bridge, and the location of piers in reference to the channel of the river; and he may prescribe other regulations as to details and plan of construction, in harmony with the requirements in relation thereto contained in the 2d section of the act; all such regulations as to location and construction looking to "the security of navigation," the principal end cared for in all the acts authorizing the building of bridges over the Mississippi and other navigable rivers and waters. But, obviously, this authority to "prescribe regulations" for location and construction does not empower the Secretary to *locate* a bridge for either of the corporations authorized by the act to build such bridge, or, in other words, to require the bridge to be built between any two points on the river which he may select. The corporation or person authorized by the act is to locate and build the bridge, submitting the location and plan to his judgment. He is to determine, first, whether the location will involve a material obstruction to navigation. If he shall think that it will not, his approval, so far as that consideration is concerned, is due. His authority as to the matter of location is conveyed in the clause "shall be built and located under and subject to such regulations for the security of navigation of said river as the Secretary of War shall prescribe," and he is not more authorized by these words

Railroad-Bridges across the Mississippi River.

to locate the bridges than he is to build them. It is hardly to be understood that they authorize him to build the bridges. But, further, it is to be observed in the case of the Milwaukee and Saint Paul Company that it is authorized to build its bridge at *any point it may select* between two counties; that is, in fact, at any point on the river within a reach of twelve or fifteen miles. So, then, the selection of a site within that distance is the privilege of the company. Whether that selection is objectionable because a bridge built at the site would interfere with free navigation, or be inconvenient of access to other railways so located as to need the use of it, is for the Secretary of War to determine. He can approve or disapprove, but the act does not give him authority to *locate*. Next, he is to consider the convenience of "railway companies desiring to use" the bridges. If he shall find that a bridge crossing the river at the location submitted will, in addition to its non-interference with free navigation, be convenient of access to railway companies desiring to use it, the conditions to justify his approval are satisfied. This seems to me to be the measure of the authority of the Secretary of War in regard to the location of the bridges under the terms of this act.

Your second question (what I have above said being in reply to your first and third) is, whether the requirement as to convenience of access for other railroads than that of the company authorized to build a bridge relates only to roads *now constructed* or in *process of construction*, or, also, to roads contemplated. The words of the said act of April 1, on this subject, refer to railway companies "*desiring to use*" the bridges. Under this language I should consider that the convenience of railway companies authorized to cross the river at the time when the Secretary is to exercise his supervisory authority, and showing an intention to avail themselves of the privilege of passage by the proposed bridge, must be consulted; but that it is not obligatory upon the Secretary to inquire and decide as to the possibility or probability that a company contemplating the construction of a road may desire to use a bridge. This would be to exercise prospective authority over the railway system in the important matter of transit over the Mississippi, probably not contemplated by Congress.

After requiring that all bridges hereafter constructed over

Railroad-Bridges across the Mississippi River.

and across the Mississippi River, under authority of an act of Congress, shall be subject to all the terms, restrictions, and requirements of the 5th section of the act of April 1, the act of June 4, referred to by you, reads as follows: "And in locating any such bridge, the Secretary of War shall have due regard to the security and convenience of navigation, to convenience of access, and to the wants of all railways and highways crossing said river."

These two acts are *in pari materia*, and are to be taken and considered together as one act. I do not think that the latter act intends to do more than to add somewhat to those matters named in the former which the Secretary of War is to take into consideration when he comes to act upon the location and plan of bridge made and proposed by the company.

Section 5 of the act of April makes provision for the "security" of navigation, but the expression is extended in the act of June so as to read "security and convenience" of navigation. Particular inquiry as to the effect of this new phraseology is unnecessary, for under either act it would seem to be the duty of the Secretary to see that the interests of navigation are not interfered with by the bridge further than is necessary for its construction under the grants and limitations of the acts in question. I think that the construction hereinbefore given to the words "desire to use," in the act of April, sufficiently explains what I understand the words "convenience of access and wants of all railways" to mean, as they occur in the act of June. With respect to the subject of highways, I respectfully refer to my opinion of August 7, 1872, (see *ante*, p. 92.)

To sum up all the questions, I should think the proper mode of procedure would be for the company to submit its location and plan of a bridge to the Secretary, and if he finds that they do not interfere with the navigation of the river more than is necessary to construct the bridge as provided for in section 2 of the act of April, and that, with a due regard to the interests of the company, it is convenient of access and use by other railways proposing to cross upon it, then the Secretary's approval ought to be given; but if he has objections on any of said grounds, the company, when they are made known, ought to have an opportunity to obvi-

Resignation of Office.

ate them if it can; and if the objection be one that cannot be removed without a change of location, then the objection must be overcome in that way, the Secretary having no right, in making objections, to take anything into consideration besides the interests of the company, except the navigability of the river and the convenience and wants of other railways preparing or proposing to cross upon the bridge.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,
Secretary of War.

RESIGNATION OF OFFICE.

In October, 1872, C., then a surveyor of customs, tendered his resignation, which was subsequently accepted by the President, to take effect on the 31st of January, 1873, about two months before the expiration of C.'s term. The appointment of C.'s successor in office was not made until the last of March, 1873. C., however, did not personally discharge any of the duties of surveyor after January 31, 1873; but, from the latter date until his successor took possession of the office, its duties were performed by the deputy surveyor whom he had previously constituted. Claim is now made by C. for the salary and emoluments of the office for that period. *Held* that, by reason of the tender and acceptance of his resignation, C. ceased to be surveyor on the 31st of January; that the authority of his deputy to act in that capacity thereupon terminated; and that the claim mentioned has no validity.

That a public office may be vacated by resignation is not only established by long and familiar practice, but is, moreover, recognized by positive law.

A resignation may be effected by the concurrence of the officer and the appointing power; its essential elements being an intent to resign on the one side and an acceptance on the other. The principle upon which it rests is agreement.

Hence, to perfect a resignation, nothing more is necessary than that the proper authority accept the offer to resign; it then becomes efficient for the end intended, and operates to relieve the incumbent either immediately or on the day specially fixed, according to its terms.

When a resignation once takes effect, the official relations of the incumbent are *ipso facto* dissolved; and he no longer has any right to, or hold upon, the office.

Resignation of Office.

The right of an incumbent of any office established under the Government of the United States to continue therein after the expiration of his term until the appointment of his successor, depends upon whether Congress has thus provided; so that where Congress has not authorized the officer to hold over, his incumbency must be deemed to cease at the end of his term, though no appointment of a successor may then be made. Opinion of Attorney-General Butler (2 Opin., 714) disapproved.

Seem that even if an officer, in such case, were authorized to hold over after the expiration of his term, his resignation, if accepted, would discharge him from office, though a successor might not be appointed when the resignation, by its terms, takes effect.

Under the 22d section of the act of March 2, 1799, chap. 22, in the event of the disability or death of the surveyor, the authority of his deputy to act as such terminates; and the term "disability," as used in that section, is comprehensive enough to embrace any cause whereby the officer becomes no longer capable of discharging the duties of the office, and in this sense it includes the case of a resignation.

DEPARTMENT OF JUSTICE,*June 17, 1873.*

SIR: Your communication of the 3d ultimo, and accompanying papers, present the following case:

On the 22d of October, 1872, by a letter of that date, Mr. A. B. Cornell, then holding the office of surveyor of customs for the port of New York, tendered his resignation, which was subsequently accepted by the President, to take effect on the 31st of January, 1873; the time thus fixed being about two months before the end of the term for which Mr. Cornell had been appointed.

In the latter part of March, 1873, Mr. George H. Sharpe was appointed to the same office, and in compliance with directions contained in a letter of the Commissioner of Customs, dated March 28, 1873, Mr. Cornell delivered the public property in his possession to Mr. Sharpe, the delivery taking place on the 31st of that month.

It does not appear that Mr. Cornell ever withdrew his resignation, or that the President ever revoked his acceptance thereof; nor does it appear that the former discharged personally any of the duties of surveyor after January 31, 1873.

From the last-mentioned date until Mr. Sharpe took possession of the office, its duties were performed by the deputy surveyor whom Mr. Cornell had constituted soon after the commencement of his term; and the salary and emoluments

Resignation of Office.

of the office for that period are claimed by Mr. Cornell, on the ground, as it seems, that he remained the lawful incumbent of the office until relieved by a successor, and that the discharge of its duties by the deputy as aforesaid was a discharge of them by the claimant.

My opinion is requested as to the validity of this claim, upon the facts above stated.

The main question here involved appears to be, whether Mr. Cornell, in consequence of the tender and acceptance of his resignation, ceased to hold the office of surveyor on the 31st of January, 1873.

That a public office may be vacated by resignation, admits of no doubt. This mode of vacating an office is established by long and familiar practice, and is recognized by express provision of law. Thus the Constitution mentions vacancies which happen by resignation, (see art. 1, sec. 3, par. 2; also, art. 2, sec. 1, par. 5,) and in the legislation of Congress vacancies so happening are likewise mentioned. (See sec. 3, act of March 2, 1867, 14 Stat., 430.) Nor can there be any doubt that a resignation may be effected by the concurrence of the officer and the appointing power. Its essential elements are an intent to resign on the one side, and an acceptance on the other. The principle upon which it rests is agreement; and in the absence of statutory regulation prescribing a particular form by which it shall be evidenced, it may be either in writing or by parol, expressly or by implication. To perfect a resignation nothing more is necessary than that the proper authority manifest in some way its acceptance of the offer to resign. It then becomes effectual, and operates to relieve the incumbent either immediately or on the day specially fixed, according to its terms.

An offer to resign is revocable by the officer prior to acceptance; after acceptance, and before it has taken effect, it may be modified, or withdrawn entirely, by consent of both parties; but this control over it, in point of duration, would seem to extend no further. When a resignation once takes effect, the official relations of the incumbent are *ipso facto* dissolved; he no longer has any right to, or hold upon, the office. This is shown by the fact that an avowal that the prosecutor has duly resigned his office is a good return to a

Resignation of Office.

mandamus to restore. (Angel and Ames on Corp., sec. 723; Wilcox on Corp., 239.) And in further corroboration of the same view, I may observe that it has been held by one of my predecessors that the resignation of a military officer, duly accepted by the proper authority, operated to remove the officer; that thereafter the latter was out of the service as completely as if he had never been in it; and that he could only be restored thereto by a new appointment. (See *Captain Mimmack's Case*, 12 Opin., 555.)

In the case now before me, it is not stated that there was anything in the terms of the resignation offered which precluded its acceptance to take effect at the time designated. The legal sufficiency of the acceptance may therefore be fairly assumed, and since no additional act was required, either on the part of Mr. Cornell or on the part of the President, to perfect the resignation or make it efficient for the purpose of vacating the office, the incumbency of the former must, on the principle above stated, have necessarily terminated when that time arrived, unless the resignation had previously been modified or withdrawn, of which there is no evidence. I am thus led to the conclusion that, by reason of the tender and acceptance of his resignation as aforesaid, Mr. Cornell ceased to be surveyor at the time referred to. This, in my opinion, is decisive of the matter in hand, and establishes the invalidity of the claim. But it is thought proper to consider briefly the principal ground taken in its support.

It is urged that, notwithstanding his resignation, Mr. Cornell continued in legal contemplation to hold the office until the appointment of Mr. Sharpe; that, as a general rule, an officer after the expiration of his term holds over until relieved by his successor, and that there is no difference, in this respect, between an officer who has resigned and one whose term has expired.

In some of the State courts the doctrine has been laid down that where the term of an office is not limited to expire at a fixed time or upon a specified event, but there is simply a direction for the annual election of the officer, his original term continues, though after the year, until a successor is duly elected and qualified. (9 Am. Law Reg., N. S., 373; *Stratton vs. Oulton*, 28 Cal., 44.) In others, however, it has been de-

Resignation of Office.

nied that there is any common-law rule by which a public officer appointed or chosen for a specific term can hold office beyond that term, upon the failure of the proper body to appoint or elect a successor. (*People vs. Tieman*, 30 Barbour, 193; *Philips vs. Wickham*, 1 Paige, 590.) Attorney-General Butler, in an opinion dated April 7, 1835, thought that on the ground of public necessity the officers mentioned in the act of May 15, 1820, (which includes, among others, district attorneys, collectors of customs, naval officers, and surveyors of customs,) must be considered in contemplation of law as holding their offices until their successors shall be duly appointed and qualified. (2 Opin., 714.) But the contrary has since been held by the district court of the United States for the eastern district of Pennsylvania, in the case of the United States district attorney for that district. (See 16 Am. Law. Reg., 786.) This decision, as it would seem, accords with the view previously expressed by the Supreme Court of the United States in the case of *The United States vs. Eckford's executors*, (1 How., 250.) The court there (*ibid.*, 358) remark: "Under the act of 1820, collectors can only be appointed for four years. At the end of this term the office becomes vacant, and must be filled by a new appointment." And the circumstance that Congress has expressly provided that certain officers whose appointments are for a definite term shall hold until their successors are appointed and qualified, (as for example, by the act of February 5, 1867, in the case of pension-agents, in addition to which other instances might be cited,) may be viewed as an indication that in the opinion of that body there does not exist any general rule of law continuing an incumbent in office after his term expires. Chancellor Walworth in *Philips vs. Wickham*, *supra*, remarked that "the numerous statutes, both here and in England, giving such authority in express terms, seem wholly inconsistent with any such common-law principle."

Upon the whole, I think that, as regards offices established under the Government of the United States, the right of the incumbent of an office to continue therein after the expiration of his term, until the appointment of his successor, depends altogether on whether Congress has provided that he may so continue; and that where the legislature has not

Resignation of Office.

authorized the officer to hold over, his incumbency ceases at the end of his term.

Yet, even where an officer is authorized to thus hold over after the expiration of his term, it seems to me that his resignation, if accepted by proper authority, would have the legal force and operation to relieve him from official responsibility, and discharge him from the office, though a successor were not appointed when the resignation by its terms took effect. No instance has fallen under my notice in which it has been held that a public officer, after having duly resigned, continued to be chargeable with the duties or entitled to the emoluments of the office so relinquished.

With regard to the performance of the duties of the office of surveyor by the deputy constituted by Mr. Cornell, this, it is claimed, was in law a performance of them by the latter, who must therefore be regarded as still holding the office, notwithstanding his previous resignation, during the period those duties were thus discharged.

The authority of a surveyor of customs to create a deputy is given by the 22d section of the act of March 2, 1799, (1 Stat., 644.) That section provides, "that every collector, naval officer, and *surveyor*, in cases of occasional and necessary absence, or of sickness, and not otherwise, may respectively exercise and perform their several functions by deputy, duly constituted under their hands and seals respectively, for whom, in the execution of their trust, they shall respectively be answerable. * * * And in every case of the disability or death of a surveyor, it shall be lawful for the collector of the district to nominate some fit person to perform his duties and exercise his authorities; and the authorities of the persons who may be empowered to act in the stead of those who may be disabled or dead shall continue until successors shall be duly appointed and ready to enter upon the execution of their respective offices."

It will be perceived that the cases in which a surveyor is authorized to perform his duties by deputy are limited to those of *occasional and necessary absence* and of *sickness*. Here he is presumed to be still the incumbent of the office, capable of discharging its duties, though absent or sick; and in these cases he still acts, but acts by deputy. But in the event of

Case of Samuel J. Harris.

the *disability* or *death* of the surveyor, the authority of his deputy, as such, would seem to terminate; the collector being then empowered to appoint a fit person to perform the duties until a successor is appointed. The word "disability," as used in the statute, is comprehensive enough to embrace any cause whereby the officer becomes no longer capable of discharging the duties of the office, and in this sense it includes the case of a resignation. Thus it has been held that a law conferring power to supply by appointment a place vacated by death or disability, authorizes an appointment to be made where the vacancy is occasioned by resignation. (*State vs. City of Newark*, 3 Dutcher, 185-197.)

Accordingly, when the resignation of Mr. Cornell took effect and he thereby ceased to be surveyor, there arose a disability which put an end to the authority of his deputy to further act in that capacity, as effectually as if the office had been vacated by death; and though the deputy continued afterward to discharge the duties of the office, yet he can no more be regarded, from a legal point of view, as having discharged them as the representative of Mr. Cornell than if the latter had died instead of resigned.

After careful consideration of the claim, in connection with the facts presented, I am unable to arrive at any other conclusion than that already indicated, namely, that it has no validity.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. WM. A. RICHARDSON,

Secretary of the Treasury.

CASE OF SAMUEL J. HARRIS.

Where a soldier belonging to the Ninth Regiment of Infantry deserted on the 19th of September, 1870, but in about one year afterward re-enlisted under an *alias* in the Sixth Regiment of Infantry, and (he having subsequently acknowledged that he was a deserter from the former regiment) an order was issued on the 11th of March, 1873, for his trial by a court-martial for desertion, of which offense he was thereupon tried by the court, convicted, and sentenced to punishment: *Held* that the prosecution was barred by the two years' limitation prescribed by the 88th article of war, and that, consequently, the conviction and sentence of the court are void.

Case of Samuel J. Harris.

"Manifest impediment," as used in that article, does not mean merely want of evidence, or ignorance as to the offender or offense by the military authorities; but it means something akin to absence—want of power, or a physical inability to bring the party charged to trial.

DEPARTMENT OF JUSTICE,

June 30, 1873.

SIR: I have the honor to acknowledge the receipt of your letter of the 24th instant, inclosing the record of a court-martial in the case of Private Samuel J. Harris of the Ninth Infantry, and have considered the question, stated in the indorsement of the Judge-Advocate-General thereon, as to the legality of the proceedings of the court in view of the limitation of time within which prosecutions for military offenses may be tried and punished, prescribed by the 83th article of war.

The record shows that Harris enlisted in the Ninth Infantry on the 16th day of August, 1870, and deserted on the 19th day of the next ensuing month. About one year afterward he enlisted in the Sixth Infantry under an *alias*, and on or about the 26th of October, 1872, he confessed to an officer of that regiment that he was a deserter from the Ninth Infantry. On the 11th of March, 1873, an order was issued for the convening of the court before which he was tried, and on the 24th of April his trial was proceeded with, and he was found guilty of the offense and sentenced to punishment.

The 88th article of war prescribes that "no person shall be liable to be tried and punished by a general court-martial for any offense which shall appear to have been committed more than two years before the issuing of the order for such trial, unless the person, by reason of having absented himself, or some other manifest impediment, shall not have been amenable to justice within that period."

To determine the question in this case, it is necessary, as far as practicable, to define the meaning of the words "by reason of having absented himself," as used in said article.

They certainly do not mean absence from the State or beyond seas, as those terms are ordinarily used in statutes of limitation, for they relate only to civil jurisdiction. To say that they mean absence from the company in which, or locality where, the offender enlisted, would seem to be a too narrow

Case of Samuel J. Harris.

construction. I am inclined to think that it would be fair to hold that the absence contemplated by the article is an absence from the reach or jurisdiction of the military authorities. To avoid the limitation of the article, it would seem to be necessary that the accused should not only be absent, but that he should be where the military authorities by reasonable diligence could not make him amenable to justice.

Harris was absent from his company for more than two years, but he was absent from the Army but little more than one year. He re-enlisted under an *alias*, and the strong probability is that his identity was not known until after he confessed that he was a deserter, which was not until after the lapse of two years from the date of his desertion. But this is more a lack of evidence than a want of jurisdiction. He was, after about one year's absence, where he could be arrested and tried any day, but the Army authorities had not the necessary evidence upon which to proceed.

Article 22 makes provision for the punishment of a person for re-enlistment in a company or a regiment without regular discharge from another. But it seems to me that when a person has committed an offense for which he is triable by a court-martial, and for any part of the ensuing two years is in the Army, or subject to its authority, without arrest or trial, the military jurisdiction over that offense is at an end. "Manifest impediment," as used in the 88th article does not mean merely want of evidence, or ignorance as to the offender or offense by the military authorities, but it means something akin to absence—want of power, or a physical inability to bring the party charged to trial. There was no manifest impediment in the case of Harris, unless his concealment of the fact that he was a deserter was such, which cannot be held without holding that persons subject to trial by court-martial can be tried at any time after the commission of the offense, whenever the military authorities think they have evidence enough to secure a conviction. This would be practically an abolition of the limitation.

Attorney-General Wirt, in discussing the 88th article of war, says, speaking of the limitation: "I do not think that it is competent for any individual to waive it, or that a court-martial can proceed, even on the application of the arrested party

Freedmen's Bureau.

to examine into offenses of more than two years' standing previous to the order summoning the court, unless the prosecutor can show that the party accused, by reason of absence or some other manifest impediment, had not been amenable to justice within the time limited by the rule." (1 Opin., 384.)

Attorney-General Black says, (9 Opin., 183,) "Causes of delay arising from the conduct of the party accused are manifest impediments within the meaning of the 88th article. It is a broad principle of law and of natural justice that no man can take advantage of his own wrong; accordingly, whenever we find statutes of limitations in favor of offenders, they are coupled with an exception against persons beyond the jurisdiction of the proper court and fugitives from justice."

This language needs some modification. Persons prosecuted for crime are not allowed to claim that the statute of limitations runs in their favor for and during the time they are absent from the State or beyond seas, or, in other words, beyond the jurisdiction of the court. But any concealment of the evidence of their guilt, or other like fraud on their part while they remain in that jurisdiction, by which the prosecution is delayed until the time of the bar has run, does not deprive them of the benefit of the statute. Statutes of limitations in criminal matters apply to all cases not expressly excepted from their operation.

My opinion, therefore, is, that the proceedings of the court-martial in the case of Private Samuel J. Harris were beyond its jurisdiction, and that his conviction and sentence thereunder are void.

Very respectfully,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,
Secretary of War.

FREEDMEN'S BUREAU.

The Commissioner of the Freedmen's Bureau is liable for all losses sustained by the Government through the default of subordinate disbursing-officers or other persons employed by him in the disbursement of the moneys intrusted to him under the joint resolution of March 29, 1867, [No. 25.]

Freedmen's Bureau.

Where a military officer, detailed for duty in that Bureau, has been guilty of misappropriation of money or any violation of the rules and regulations governing disbursing-officers of the Army, he may be tried by court-martial in the same manner as any other such Army officer.

DEPARTMENT OF JUSTICE,
July 3, 1873.

SIR: I have duly considered your communication of the 31st of May, with the accompanying documents and papers, upon the subject of the frauds in the late Bureau of Refugees, Freedmen, and Abandoned Lands.

The papers which you transmit me are in many respects incomplete, and particularly so in not including the bonds or copies of the bonds of the Commissioner of said Bureau and of its chief disbursing-officer, and I have been able to obtain but one of them. I think, however, that I have enough facts before me to enable me to answer the questions which you propose.

The Freedmen's Bureau was established by the act of March 3, 1865, (13 Stat., 507,) the material parts of which are as follows:

By section 1 it is provided that "the said Bureau shall be under the management and control of a Commissioner, to be appointed by the President, by and with the advice and consent of the Senate, whose compensation shall be three thousand dollars per annum, and such number of clerks as may be assigned to him by the Secretary of War; * * * and the Commissioner and chief clerk shall, before entering upon their duties, give bonds to the Treasurer of the United States, the former in the sum of fifty thousand dollars, and the latter in the sum of ten thousand dollars, conditioned for the faithful discharge of their duties respectively, with sureties to be approved as sufficient by the Attorney-General, which bonds shall be filed in the office of the First Comptroller of the Treasury, to be by him put in suit for the benefit of any injured party upon any breach of the condition thereof."

Section 3 provides for the appointment by the President, by and with the advice and consent of the Senate, of an assistant commissioner for each of the States declared to be in insurrection, not exceeding ten in number, "who shall, under the direction of the Commissioner, aid in the execution of the

Freedmen's Bureau.

provisions of this act, and he shall give a bond to the Treasurer of the United States in the sum of twenty thousand dollars, in the form and manner prescribed in the first section of this act; * * * and any military officer may be detailed and assigned to duty under this act without increase of pay or allowances. The Commissioner shall, before the commencement of each regular session of Congress, make full report of his proceedings, with exhibits of the state of his accounts, to the President, who shall communicate the same to Congress and shall also make special reports whenever required to do so by the President or either House of Congress."

By a resolution of March 29, 1867, (15 Stat., 26,) it is provided "that all checks and Treasury certificates to be issued in the settlement of claims for pay, bounty, prize-money, or other moneys due to colored soldiers, sailors, or marines,

* * * shall be made payable to the Commissioner of the Freedmen's Bureau." Section 2 enacts "that the Commissioner of the Freedmen's Bureau shall be held responsible for the safe custody and faithful disbursement of the fund intrusted to him," and section 3 provides "that all moneys held or disbursed under the provisions of this resolution shall be held and disbursed under the same rules and regulations governing other disbursing-officers of the Army."

The papers which you inclose to me show that considerable sums of money have been taken from the Treasury by officers employed in this Bureau, by means of forged receipts and vouchers for bounties due colored soldiers, and by means of receipts and vouchers fraudulently procured from them, and you ask my opinion upon two questions:

1st. In cases where the guilty parties cannot be prosecuted, what should be the course in order to the protection of the interests of the Government and of claimants?

2d. When prosecution is not barred by the statute of limitations, what action should be had? To what extent are the late Commissioner of the Bureau of Refugees, Freedmen, and Abandoned Lands, and his chief disbursing-officer, responsible?

Your questions are not quite so explicit as I could wish, and I am not certain whether by the word "prosecution" you refer solely to criminal proceedings against the offender, or

Freedmen's Bureau.

to civil and criminal. For offenses of this kind, it is open to the Government to proceed criminally against the offender, and likewise to proceed in civil action against him and against any person who is responsible for his acts. Where it is impossible to proceed criminally, either by the offender's having absconded or the prosecution being barred by the statute of limitations, he may be sued in civil action if it be deemed expedient, or if property of his can be attached. If, therefore, any disbursing-officer or other officer or clerk employed by the Bureau has obtained money, in the methods mentioned in your communication, from the Government, and it is thought best to sue him personally, the papers may be sent to the district attorney of the district in which he resides, or where he has property, for action. There is no statute barring the United States in civil actions.

The late Commissioner of the Freedmen's Bureau gave no bond on his appointment in 1865, because, as he informed me, Mr. Stanton, then Secretary of War, did not think that the provision in respect of bonds was intended to apply to the case of an officer of the Army detailed for duty under that act. After due consideration, I find it impossible to concur in this opinion.

The object of a bond is not to have the means of punishing a defaulter, but the protection of the Government from pecuniary loss, and this object is just as important in case of a military officer as of a civilian. A bond, however, given under the act of 1865, clearly would not cover loss of money paid to the Commissioner under the joint resolution of 1867; but by the 3d section of that resolution all money paid or disbursed thereunder "shall be held and disbursed under the same rules and regulations governing other disbursing-officers of the Army." This required the Commissioner to give a bond in the same manner that any disbursing-officer of the Army would do.

On the 31st of October, 1871, the Commissioner did give a bond in the sum of ten thousand dollars, the condition of which recites that he has been appointed "a special agent and disbursing-officer of the Bureau of Refugees," &c., and provides that he shall "henceforth, during his holding and remaining in said office, carefully discharge the duties thereof,

Freedmen's Bureau.

and faithfully expend all public money, and honestly account for the same, and for all public property which shall or may come into his hands on account of subsistence and Quartermaster's Department or of said Bureau, without fraud or delay."

This bond was not given till four years after the appointment of the Commissioner to pay the claims of colored soldiers under the joint resolution of 1867, and of course covers no default previous to its date. The form would seem to be one prepared for bonds of ordinary disbursing-officers of the Army, and is a little ambiguous in designating the office and duties of the principal obligor. Reference ought to have been made in the bond to the joint resolution.

There is no provision requiring any other officer than those already named to give bonds, but it was perfectly lawful to take a bond from any subordinate officer of the Bureau, employed in the disbursement of money, direct to the United States, and such bond would have been valid and binding although not required by statute. (*United States vs. Hodson*, 10 Wall., 395.)

Under the act of 1865 the Commissioner of the Freedmen's Bureau would not, I think, be liable for moneys paid directly to the assistant commissioners, and disbursed by them. The assistant commissioners were not appointed by him, nor were they his agents, but were Government officers, and by requiring bonds to be given by these officers the statute would seem to have intended to relieve the Commissioner from liability for their acts within the limits of their several jurisdictions. But the joint resolution of 1867 is very explicit; all money paid under that act is paid directly to the Commissioner, and it is enacted that "he shall be responsible for the safe custody and faithful disbursement of the fund intrusted to him." Nothing is said about any of the assistant commissioners or about any disbursing-officer, and although it was probably necessary and undoubtedly was lawful for the Commissioner to appoint and employ disbursing-officers besides himself, nevertheless he is responsible civilly under this act for their acts the same as if done by himself; and even if he took bonds from them directly to the Government, this cannot relieve him of such liability. The Government may en-

Freedmen's Bureau.

force both securities in order to indemnify itself for any loss which, through the default of a subordinate officer, it may have suffered. This liability might in some respects be enlarged by the terms of the bond given by the Commissioner, but it, of course, could not be in the least diminished.

The Commissioner of the Freedmen's Bureau, therefore, is liable for all losses sustained by the Government through the default of a subordinate disbursing-officer or other persons employed by him in the disbursement of the moneys intrusted to him under the joint resolution of 1867.

As to the chief disbursing-officer, it is almost impossible, upon the facts which are now before me, to state what his liability to the Government may be. Of course he is liable, both civilly and criminally, for his own misconduct. How far he is liable for the acts of subordinates employed under him, is a question which it is impossible for me to answer without a copy of his bond, and without more information in respect of his appointment and employment than I have been able to obtain from a perusal of the papers sent to me. If any other officers gave bonds to the Government, their sureties are liable for their misconduct, or loss occasioned by them, according to the tenor thereof. Further than this, upon the facts before me, I cannot answer.

Your second question seems likewise to include the subject of criminal, in addition to civil, prosecutions. For acts of fraud or embezzlement under this act, the offending parties are, of course, liable criminally, unless the offense is barred by the statute limiting ordinary criminal prosecutions to two years. Any disbursing or other officer who has misappropriated money intrusted to him under this act may be indicted therefor, whether he is appointed directly by the Government or is a subordinate officer or clerk appointed by the Commissioner or any other officer of the Bureau. (*United States vs. Hartwell*, 6 Wall., 385.) Such prosecution must be by indictment, unless the offender is liable to trial by court-martial.

By section 3, "any military officer may be detailed and assigned to duty under this act without increase of pay or allowances."

It is sufficient for the present case to say that a military

Freedmen's Bureau.

officer so detailed and assigned to duty still remains within military jurisdiction, and is liable to military law for any violation of his duty as such.

A more difficult question arises under section 3 of the joint resolution of March 29, 1867, whereby "all money held or disbursed under the provisions of this resolution shall be held and disbursed under the same rules and regulations governing other disbursing-officers of the Army." The language of this is a little obscure when reference is made to the act establishing the Freedmen's Bureau, and this obscurity probably arises from the fact, of which I am informed, that all the principal officers of the Bureau were military officers assigned to this special duty. I do not think that this provision can be considered as subjecting to trial by court-martial a person not otherwise subject to such jurisdiction. To have that effect an act ought to be clear and unambiguous, and it would only be by a most forced and violent construction that "rules and regulations governing other disbursing-officers of the Army" can be interpreted to include liability to trial by martial law in respect of civilians.

The "rules and regulations" governing disbursing-officers would establish the degree of responsibility and accountability to which the Commissioner would be liable, leaving his trial by civil or military tribunal to depend upon his civil or military status. This question, however, if the facts be as I am informed, is of no practical importance.

If, therefore, any military officer detailed for duty in the Freedmen's Bureau has been guilty of misappropriation of money, or any violation of the rules and regulations governing disbursing-officers of the Army, he may be tried by court-martial in the same manner as any other such Army officer.

Finally, I need hardly say that claim-agents and other persons, not officers of the Government, who have obtained money from the Bureau by means of forged receipts and vouchers, and other frauds, can be prosecuted criminally if two years have not elapsed since the commission of the crime, and can also be sued in the civil courts by the United States in the same manner as employés of the Bureau can be.

As I have before said, there is no statute limiting the time

Internal Revenue.

within which the Government can begin a civil suit; but suits for penalties and double damages, under the act of March 2, 1863, must be begun within six years. (12 Stat., 696-698.)

I have the honor to be, very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,
Secretary of War.

INTERNAL REVENUE.

The rule that a final decision, upon a knowledge of all the facts, made by an officer authorized to decide on claims against the Government, is not to be re-opened and reviewed by his successors in office, except for the correction of mistakes such as errors in calculation, &c., re-affirmed, and applied to cases acted upon by the Commissioner of Internal Revenue under the 44th section of the act of June 30, 1864, chap. 173.

DEPARTMENT OF JUSTICE,
July 16, 1873.

SIR: I have the honor to acknowledge the receipt of your letter of June the 18th, requesting my opinion on the following point:

"Can the Commissioner of Internal Revenue re-open a case in which one of his predecessors, acting under the authority conferred by section 44 of the internal-revenue act of June 30, 1864, (13 Stat., 239,) has disallowed a portion only of a sum claimed to be illegally collected under section 6 of the above-stated act, (13 Stat., 208,) the part allowed and the part disallowed resting on the same evidence?"

The sections of the acts referred to in your question contain the following provisions:

"Section 44. *And be it further enacted,* That the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, shall be and is hereby authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that shall appear to be unjustly assessed or excessive in amount or in any manner wrongfully collected."

Internal Revenue.

"Section 6. First: On cotton, raw or unmanufactured, two cents per pound."

The act of July 13, 1866, (14 Stat., 98,) provides that there shall be paid by the producer, owner, or holder, upon all cotton produced within the United States, and *upon which no tax has been levied or paid or collected*, a tax of three cents per pound as hereinafter provided; and the weight of such cotton shall be ascertained by deducting four per centum for tare from the gross weight of each bale or package.

In your letter you state that prior to the act of July 13, 1866, the law contained no specific provision for deduction of the weight of the rope and bagging from the gross weight of cotton. That on November 11, 1865, Commissioner Rollins issued instructions that a reasonable allowance be made for the same. That the Department has latterly consented to a specific allowance of four per centum for bagging and rope in cases where the cotton-tax was collected prior to the act of July 13, 1866, and not acted upon by any prior Commissioner. That acting upon the decision of November 11, 1865, Commissioner Rollins refunded in each claim only so much of the amount as was paid subsequent to the date of his ruling rejecting the remainder.

Application has been made to the present Commissioner for the re-opening and allowance of some of the claims thus allowed in part and rejected in part by one of his predecessors.

The rule that a final decision, upon a knowledge of all the facts, made by an officer authorized to decide on claims against the Government, is not liable to be re-opened and reviewed by his successors in office, unless the decision is founded on mistakes in matters of fact arising from errors in calculation or the absence of material testimony afterward discovered or produced, is well established. (15 Peters, 400; 2 Opin., 463, 507, 517; 12 Opin., 172, 358; 9 Opin., 34; 13 Opin., 397.)

In *Chorpenning's Case*, (12 Opin., 358,) Attorney-General Stanbery says: "I take it to be a well-settled principle that the final decision of a case before a head of a Department is binding upon his successors in the same Department, subject, however, to some equally well-established exceptions, and these are where there has been a palpable error of calculation, or where new facts are subsequently brought forward

Internal Revenue.

which show that the former decision was erroneous and would not have been made if they had been known at the time of the decision."

And in *Tharp's Case*, (2 Opin., 464,) Attorney-General Taney uses the following language: "For if a final decision, upon a knowledge of all the facts, made by an officer authorized to decide on claims against the Government, is liable to be opened and reviewed by his successor in office, every change in the officer will produce a new hearing of the claim, and the accounts of the Government will always remain open and unsettled."

In 9 Opinions, 34, Attorney-General Black holds that "if it has been once heard and determined by the proper officer, there can be no propriety in opening it anew. This rule is well settled, and ought to be strictly adhered to."

Has the subject-matter of the cases asked to be re-opened been already adjudicated? Can it be shown that when the original decision was made there were mistakes arising from errors in calculation, or that any facts existed at that time which were not before the Commissioner, or that any facts have since transpired which have any bearing upon the question submitted to him? Unless this can be shown, these cases are not exceptions to the well-settled principles of law.

The ruling of the present Commissioner in recent cases can have no bearing upon the decision of the Commissioner in cases for which relief is sought. It was a matter of discretion with the old Commissioner, and is also a matter of discretion with the present Commissioner.

There is no law allowing a specific deduction in cases in which the tax was paid prior to the act of July 13, 1866; and the present Commissioner, in allowing the deduction of 4 per centum on such cases as are originally brought before him, makes a separate ruling, which applies to such cases, but not to cases decided by prior Commissioners.

Very respectfully,

GEO. H. WILLIAMS.

Hon. WM. A. RICHARDSON,
Secretary of the Treasury.

Telegraphic Communications.

TELEGRAPHIC COMMUNICATIONS.

Telegraphic messages between district attorneys and marshals, on official business, are entitled to be transmitted over telegraphic lines operating under the provisions of the act of July 24, 1866, chap. 230, at the rates fixed by the Postmaster-General pursuant to the 2d section of that act. The word "between," as used in that section, is to be taken distributively, as applying to official communications between one Department of the Government and another, between a Department and its officers and agents or the officers and agents of another Department, between officers and agents of the same Department, and, finally, between officers and agents of one Department and those of another.

The only limitation applicable is, that the telegraphing must be in cases where the rates are payable out of public moneys, or are to be accounted for to the Government by the officer making the expenditure.

DEPARTMENT OF JUSTICE,
July 10, 1873.

SIR: I have the honor to acknowledge the receipt of your letter of the 26th ultimo, asking for my opinion upon a case presented, as follows:

The Hon. William Orton, president of the Western Union Telegraph Company, in a letter addressed to you under date of 20th June, ultimo, expressed the opinion that the Government rates should not apply to telegraphic communications on official business transmitted directly between officers or agents of the Government, and you quote from his letter as follows: "A district attorney of the United States applied for an order directing that his messages relating to his official business be received and payment accepted at Government rates. I expressed the opinion that the rates which the Postmaster-General is authorized to fix are applicable only to communications exchanged between the several Departments of the Government and their officers and agents, and not upon communications between such agents directly. But as such a construction, if accepted, would be difficult to enforce, I suggested that the test, applicable to all cases where claim is made that messages should be sent at Government rates, should be this: If the tolls are to become a charge against the United States, payable out of the Treasury, then the message should be sent at Government rates; but if, as in the case of a United States marshal or attorney, the disbursements for

Telegraphic Communications.

telegraphing are payable out of official fees or commissions or from the proceeds of penalties or forfeitures, then the Government rates should not apply."

I do not agree to the applicability of the test proposed by Mr. Orton, or to his conclusions upon the point presented. Certain rights and privileges as to the public lands, and otherwise, are granted by the act of July 24, 1866, entitled "An act to aid in the construction of telegraph-lines, and to secure the Government the use of the same for postal, military, and other purposes," (14 Stat., 221,) to such telegraph companies as shall file with the Postmaster-General a written acceptance of the obligations and restrictions thereby imposed.

Section 2 of said act is as follows: "That telegraphic communications between the several Departments of the Government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster-General."

Manifestly, the object of this section, as indicated by the title of the act, was to require such companies as availed themselves of its benefits to transact the business of the Government at rates to be annually fixed by the Postmaster-General. I think that the word "between" in said section should be taken distributively, as applying to communications between, first, one Department and another; second, a Department and its officers and agents; third, a Department and the officers and agents of another Department; fourth, the officers and agents of the same Department; and, fifth, the officers and agents of one and those of another Department. This construction is, in my judgment, in conformity with the reason of the statute.

Mr. Orton seems to think that district attorneys and marshals are entitled to the fees which they receive. But they are required by the 3d section of the act of February 26, 1853, (10 Stat., 161,) to account for every dollar thereof, and pay over the same into the Treasury of the United States, retaining therefrom a compensation fixed by law for their services. To compel them, therefore, to pay higher than other officers for official telegraphing would be, to that extent, in many

Telegraphic Communications.

cases, as much of a loss to the Treasury as though the money had been directly appropriated therefrom for that purpose.

Mr. Orton's test is wholly inadmissible on account of its want of uniformity. Why should an officer whose maximum compensation is three thousand dollars, to be made out of fees, pay for Government telegraphing higher rates than any other officer for similar telegraphing whose salary of three thousand dollars is paid directly out of the Treasury?

Mr. Orton gives an unreasonably narrow construction to the 2d section of said act. Why should a telegraphic message from the Attorney-General to a district attorney be sent for twenty-five cents, when the district attorney, for telegraphing the same number of words the same distance to the marshal of his district, and upon the same business, is compelled to pay one dollar? Both messages may be of equal importance, and both upon Government business. Can any good reason be given why a collector of internal revenue, in telegraphing to a district attorney upon the business of his office, should pay a higher rate than the Commissioner of Internal Revenue is required to pay for a like telegram to the collector? Departments, so far as their administrative acts are concerned, are nothing but officers and agents of the Government.

Clearly, to my mind, the intent of Congress was that telegraph companies, operating under the act of July 24, 1866, should transact the business of the Government at rates fixed by the Postmaster-General, and it is of minor importance as to who sends or receives the telegram. My opinion, therefore, is that the Departments, their officers and agents, may interchangeably telegraph each other, as hereinbefore stated, upon official business, subject only to the limitation that the telegraphing must be in cases where the rates are payable out of public moneys, or are to be accounted for to the Government by the officer making the expenditures.

Very respectfully,

GEO. H. WILLIAMS.

Hon. JNO. A. J. CRESWELL,
Postmaster-General.

Extradition.

EXTRADITION.

Where a citizen of Prussia, charged with the commission of a crime in Belgium, and with having thence afterward fled to the United States, was demanded by the German government, for the purpose of trial and punishment, under the extradition treaty between the United States and Prussia of June 16, 1852, which provides for the delivery up of persons who, being charged with certain crimes "committed within the jurisdiction of either party," shall be found within the territories of the other: *Held* that although, by the law of Prussia, the accused might be justiciable in that country for the alleged offense, irrespective of the locality of its commission, yet that under said treaty the *locus delicti* is material, and unless it be within the jurisdiction of the demanding party the provisions of the treaty do not apply; and that, accordingly, in the present case, as the place where the alleged crime was committed is manifestly not within the jurisdiction of Germany, the accused was not demandable under the treaty.

DEPARTMENT OF JUSTICE,
July 21, 1873.

SIR: I have the honor to acknowledge the receipt of your communication of the 7th instant, in which you submit for my official opinion the following case and question:

"Carl Vogt, a Prussian citizen, charged with the commission of the crimes of murder, arson, and robbery, committed in Brussels, in the kingdom of Belgium, is found a fugitive in the United States. Can the German government, under the provisions of the treaty for the extradition of criminals concluded between the United States and Prussia and other states, June 16, 1852, rightfully demand the surrender by this Government of the fugitive Vogt, in order that he may be tried and punished in Prussia for the offense which he is alleged to have committed in Belgium?"

Those parts of the preamble and treaty applicable to this question are as follows:

Preamble. "Whereas it is found expedient for the better administration of justice and the prevention of crime *within the territories and jurisdiction* of the parties, respectively, that persons committing certain heinous crimes, being fugitives from justice, should, under certain circumstances, reciprocally be delivered up, and also to enumerate such crimes explicitly;

Extradition.

and whereas the laws and constitution of Prussia and of the other German states, parties to this convention, forbid them to surrender their own citizens to a foreign jurisdiction, the Government of the United States, with a view of making the convention *strictly reciprocal*, shall be held equally free from any obligation to surrender citizens of the United States."

Article 1. "It is agreed that the United States and Prussia, and the other states of the Germanic Confederation included in, or which may hereafter accede to, this convention, shall, upon mutual requisitions by them or their ministers, officers, or authorities, respectively made, deliver up to justice all parties who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged papers, or the fabrication or circulation of counterfeit money, whether coin or paper money, or the embezzlement of public moneys, *committed within the jurisdiction of either party*, shall seek an asylum or shall be found within the territories of the other."

You state that "the surrender of Vogt is claimed by the German government on the ground that he is a Prussian and a subject of the Emperor of Germany; that by the law of Prussia at the date of the conclusion of the extradition treaty between the United States and Prussia and other German states, 16th of June, 1852, a Prussian subject who committed certain crimes (among which those with which Vogt is charged are included) within the territory of another nation and beyond the territories of Prussia, was, nevertheless, subject to be tried and punished in Prussia. This is also now the law of the German Empire."

The following appears to be the only point in controversy: Whether or not, according to the true intent and meaning of said treaty, the crimes committed by Vogt in the kingdom of Belgium were committed within the jurisdiction of Germany.

To affirm that the jurisdiction of Germany, by virtue of its own laws for the punishment of crimes, extends over the territory of Belgium, is equivalent to holding that the same jurisdiction extends to France, Great Britain, and the United

Extradition.

States, and indeed to every nation and country of the world. Manifestly, the words "committed within the jurisdiction" imply that the crimes named in the treaty may be committed without the jurisdiction of the parties thereto. But if the crimes committed in Belgium were committed within the jurisdiction of Germany, then it follows, as Belgium is as independent of Germany as any other nation, that it is impossible for crimes to be committed outside of the jurisdiction of the German Empire.

I think, too, that the treaty clearly contemplates that the fugitive claimed must be a person escaping from the jurisdiction of the party making the claim to the jurisdiction of the other party, recognizing two distinct and independent jurisdictions. But if the claim of Germany is correct in this case, Vogt is as much within her jurisdiction now as he was when the crimes charged upon him were committed, for the laws under which she claims have as much force within the United States as they have in Belgium. The laws of Germany, which provide for the punishment there of crimes committed elsewhere by her subjects, imply, *ex necessitate*, as a condition for the exercise of that power, that such guilty subjects must come or be conveyed from a foreign place or jurisdiction where the crimes are committed to some place where they can be taken or received and held by German authority. Germany has an unquestioned right to punish her subjects, if she chooses, for crimes committed in Belgium or the United States, but it would not be proper, therefore, to say that Belgium and the United States are within her jurisdiction; but it would be proper to say that she has made provisions to punish her subjects for crimes committed without as well as within her jurisdiction.

I am quite clear that the words "committed within the jurisdiction," as used in the treaty, do not refer to the personal liabilities of the criminal, but to *locality*. The *locus delicti*, the place where the crime is committed, must be within the jurisdiction of the party demanding the fugitive.

Stress is put upon the supposed difference in the meaning of the words "territory" and "jurisdiction," and it is argued that the latter is more comprehensive than the former term. This is not necessarily, but probably, so; but it does not fol-

Extradition.

low that Belgium is within the jurisdiction of Germany. All nations have jurisdiction beyond their physical boundaries. Vessels upon the high seas and ships of war everywhere are within the jurisdiction of the nations to which they belong. Limited jurisdiction by one nation upon the territory of another is sometimes ceded by treaty, as appears from the treaties between the United States, Turkey, China, Siam, and other powers. Constructive jurisdiction may possibly exist in special cases, arising in barbarous countries or uninhabited places; so that effect can be given to the word "jurisdiction," as meaning more than territory, without holding that Germany has jurisdiction over crimes committed in Paris, London, or Washington.

Local claims or definitions cannot be allowed to govern this case. When nations discuss and treat of their respective jurisdictions, they do not refer to those duties and responsibilities which a Government imposes upon its own citizens, but they contemplate those portions of the earth and places upon its surface where they have respectively sovereign power, or, in other words, the right of government.

To recognize the claim of Germany in this case would establish a precedent that might lead to serious international complications. We have no extradition treaty with Belgium, but we have with Great Britain, like that under consideration. Suppose Vogt had committed the crimes with which he is charged in England, instead of Belgium, and the British authorities contemporaneously with Germany had demanded his extradition on that account; could the United States deny that the crimes were committed "within the jurisdiction" of Great Britain, and not "within the jurisdiction" of Germany? Could not Great Britain justly complain if, after the murder of her citizens and the destruction of her property by the fugitive, her claim to him for the purposes of justice should be denied by the United States, and he should be turned over for trial to Germany, where there is no evidence of his guilt, and where his friends and sympathizers, if he has any, may be supposed to be?

Law-writers generally define the jurisdiction of a court to be the power to hear and determine a cause, and it is argued that as by the laws of Germany her courts have power to

Extradition.

hear and determine the case of Vogt, therefore his crimes were committed within her jurisdiction. One conclusive answer to this view is, that the word "jurisdiction" in the treaty is not used with reference to governmental power over the subjects of judicial procedure, but with reference to the territory and places in which that power may be exercised. Again, the courts of Germany have never had the power to hear and determine the case of Vogt. Jurisdiction over a subject is one thing; that is conferred by law. Jurisdiction over the person is another; that is a fact which has never existed in this case. Whether the courts of Germany will or not hereafter acquire jurisdiction in Vogt's case depends upon facts hereafter to arise.

Germany and the United States intended that the convention in question should be "strictly reciprocal;" but if Germany can rightfully demand the delivery up by the United States of her citizens or subjects for crimes committed in Belgium, the convention is not reciprocal; for the United States cannot demand of Germany the delivery up of their citizens for crimes committed in Belgium. There is not a single crime enumerated in the treaty for the commission of which outside of this country the United States can claim one of their citizens from Germany; and there is not only no probability that Congress will ever pass an act to that end, but its constitutional power to do so is doubted.

Reference has been made to the act of Congress of August 18, 1856, which declares that perjury committed before a secretary of legation or consular officer of the United States in a foreign country may be prosecuted and punished in this country as though committed here, and this, it is said, shows that the United States as well as Germany claim an extra-territorial jurisdiction. There seems to be no point in this reference. According to international law, the domicile of an ambassador, minister extraordinary, or consul is a part of the territory he represents, for many purposes; but independent of this, the question here is not whether a sovereign country may not punish persons coming into its hands, for crimes committed in another sovereignty, but the question here is whether a crime committed upon the admitted territory, and within the exclusive government, of an independent nation,

Extradition.

is committed within the jurisdiction of another nation. To facilitate the punishment of crime is desirable, but the United States cannot, with dignity and safety, admit that any foreign power can acquire jurisdiction of any kind within their territory by virtue of its local enactments. Objection is made to this construction of the treaty on the ground that it will make the United States an asylum for European criminals. But this objection is not matter of law, nor is it true as matter of fact; and if it was, the United States, as an act of comity, may deliver up a fugitive from justice, or the subject may be regulated by an extradition treaty as comprehensive as the parties thereto see proper to make it; or if it should appear necessary, Congress might possibly interpose by legislation.

To recognize the claim to jurisdiction accompanying the requisition in this case, may open the door to confusion and controversy as to claims of jurisdiction in other respects made under their local laws by foreign governments. The plain and practical rule upon the subject seems to be that the jurisdiction of a nation is commensurate with, and confined to, its actual or constructive territory, excepting changes made by agreement; and to this effect are the authorities. Three of the judges of the Queen's Bench, in the case of *In re Tivnan*, (5 B. & S., 645.) upon application by the United States for Tivnan, charged with the crime of piracy committed upon an American ship on the high seas, and a fugitive from justice in England, made under our extradition treaty of 1842 with Great Britain, held that the words "within the jurisdiction" in said treaty meant within the exclusive jurisdiction of the United States, and did not apply to cases of piracy on the high seas, as the person charged therewith was justiciable in any country where he was found. Chief Justice Cockburn, in his dissenting opinion, thought that the term "jurisdiction" meant the area, whether by land or water, over which the law of a country prevails, and said that it is admitted that a ship is a part of the territory of the state, or, at all events, that this ship (referring to the one on which the piracy was committed) was within the jurisdiction of the United States so as to come within the statute.

Thomas Allsop, a British subject, was charged as an accessory before the fact to the murder of a Frenchman in Paris

Extradition.

in 1858, and escaped to the United States, and as he was punishable therefor by the laws of Great Britain, the question as to whether he could be demanded by Great Britain of the American Government, under the extradition treaty of 1842, was submitted to Sir J. D. Harding, Queen's advocate, and to the attorney and solicitor-general, Sir Fitzroy Kelly, (since chief baron of the exchequer,) and Sir Hugh M'C. Cairns, (since lord chancellor,) and they recorded their judgment as follows: "We are of the opinion that Allsop is not a person charged with the crime of murder committed within the jurisdiction of the British Crown, within the meaning of the treaty of 1842, and that his extradition cannot properly be demanded of the United States under the treaty." (For-syth's Cases, p. 368.)

This is a decision exactly in point, and of high authority.

Phillimore, in his work on International Law, vol. 1, page 432, says: "There are two circumstances to be observed which occur in these and in all other cases of extradition: 1. That the country demanding the criminal must be the country in which the crime was committed; 2. That the act done, on account of which his extradition is demanded, must be considered as a crime by both states."

Wharton, in his work on the Conflict of Laws, section 957, says: "The only admissible construction of the term 'jurisdiction' is to treat it as convertible with 'country,' and to hold that no requisition lies for an offense not committed within the *country* of the requiring state. And this view is not without support in those expressions of the treaties which speak of the persons claimed as 'fugitives,' and as 'seeking an asylum' in the state on whom the requisition is made, implying as it were a change of country."

David Dudley Field, esq., in his own outlines of an international code, speaking of an article proposed on extradition, says: "The article in its present form defines the right of extradition as it is now recognized, extending only to crimes committed within the jurisdiction of the demanding nation. It may be thought desirable to extend the rule to offenses against the law of a nation committed beyond its jurisdiction, which it would have power to punish if the offender comes within its jurisdiction."

Extradition.

Attorney-General Lee, in construing the 27th article of the treaty of 1794 with Great Britain, says that it "was confined expressly to persons who are charged with murder or forgery committed within the jurisdiction of either nation, and who seek refuge in the other, meaning their territorial jurisdiction respectively." (1 Opin., 83.)

Our extradition treaty of 1843 with France provides for the delivery up of persons charged with certain crimes "committed within the jurisdiction of the requiring party," and Attorney-General Cushing held that a requisition by the French government upon the United States for a fugitive under this treaty must show that the crime was committed by the fugitive while actually in France. (8 Opin., 218.)

Courts in this country have held that under section 2, article 4, of the Constitution, providing for the reclamation by one State upon another for fugitives from justice, the requisition must show that the crime was committed within the territory of the requiring State. (3 McLean, 133; 1 Sandford, 701.)

I have carefully read the elaborate opinion of Judge Blatchford upholding the jurisdiction of Germany in this case, transmitted in your letter, but with diffidence and regret I am compelled to dissent from his views. They do not appear to me to be sound in principle or sustained by authority. (See *In re Joseph Stupp*, 11 Blatch. C. C. Rep., 124, where Judge Blatchford's opinion is reported.)

Able writers have contended that there was a reciprocal obligation upon nations to surrender fugitives from justice, though now it seems to be generally agreed that this is altogether a matter of comity. But it is to be presumed, where there are treaties upon the subject, that fugitives are to be surrendered only in cases and upon the terms specified in such treaties.

Conformably to what is above stated, I make a negative answer to your question.

I have the honor to be, very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. J. C. B. DAVIS,

Acting Secretary of State.

Ordnance-Returns.

ORDNANCE-RETURNS.

One complete annual return of ordnance and ordnance-stores, with quarterly reports noting all intermediate changes since last return, if sanctioned by the Chief of Ordnance and approved by the Secretary of War, is sufficient under the provisions of the acts of March 3, 1813, chap. 48, and February 8, 1815, chap. 38.

DEPARTMENT OF JUSTICE,

August 2, 1873.

SIR: I have received your letter of July 25, 1873, relative to ordnance-returns, together with the letter of the Chief of Ordnance, submitting the question, "Whether one complete annual return of ordnance and ordnance-stores, with quarterly reports showing the changes in stores, will not answer the requirements of the law as well as the quarterly returns now made."

The law of March 3, 1813, (2 Stat., 816,) and the amendment of February 5, 1815, (3 Stat., 203,) both leave with the Chief Ordnance Officer of the Army, under the supervision and subject to the approval of the Secretary of War, the power to fix the manner and form of making and of stating what shall constitute an ordnance-return, only making it mandatory that such returns shall be made to the proper officer *quarterly*.

The object of the law is to hold each and every officer having custody of ordnance and ordnance-stores to a *strict* responsibility for all such stores in his custody or care, and also to keep the Government fully advised of the disposition of its ordnance and ordnance-stores at its different arsenals and other places of deposit for such material.

A full annual report having been made as required by law, a report made quarterly, noting all changes since last report and referring to the annual report, would be a sufficient return in contemplation of law, if sanctioned by the Chief Officer of Ordnance and approved by the Secretary of War.

It is my opinion that one complete annual return of ordnance and ordnance-stores, with quarterly report showing the changes in stores, will answer the requirements of the law as well the quarterly returns now made, and that the form

Indian Country.

of a return can be changed to meet the requirements of the service ; always provided that the Secretary of War is quarterly informed of the property-responsibility of each and every officer.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

W. F. BARNARD, Esq.,

Acting Chief Clerk, War Department.

INDIAN COUNTRY.

Under the provisions of the 20th section of the act of June 30, 1834, chap. 161, as amended by the 2d section of the act of March 3, 1847, chap. 66 and the act of February 13, 1862, chap. 24, and also the provisions of the act of March 15, 1864, chap. 33, the introduction of spirituous liquors into the Indian country is impliedly prohibited, wherever it is not done by authority of the War Department.

Seemle, therefore, that the authority of that Department touching the introduction of liquors into the Indian country is exclusive.

Review of the legislation of Congress bearing on the question, What is Indian country within the meaning of the Indian intercourse laws ?

All reservations west of the Mississippi River which are occupied by Indian tribes, and also all other districts so occupied to which the Indian title has not been extinguished, are Indian country within the meaning of those laws, and remain (to a greater or less extent, according as they lie within a State or a Territory) subject to the provisions thereof.

DEPARTMENT OF JUSTICE,

August 12, 1873.

SIR: In June last I received a communication from the chief clerk of the War Department, dated the 16th of that month, which purports to have been sent to me during your absence, but by your direction, inclosing a number of papers relating to questions that have arisen in connection with the administration of the Indian intercourse laws.

Referring to the terms "Indian country," used in those laws, it is observed in the above-mentioned communication that the question is constantly recurring, What is Indian country ? And I understand it to be one of the objects of the communication to elicit from this Department an answer to that question. The communication, besides, contains a request for an opinion as to whether the War Department has

Indian Country.

exclusive authority to permit the introduction of spirituous liquors into the Indian country.

With regard to the subject just adverted to, it appears that by the 20th section of the act of June 30, 1834, (4 Stat., 732,) a penalty was imposed upon any person who should "sell, exchange, or give, barter, or dispose of any spirituous liquor or wine to an Indian in the Indian country," or who should "introduce or attempt to introduce any spirituous liquor or wine into the Indian country, except such supplies as shall be necessary for the officers of the United States and troops of the service, under the direction of the War Department." The effect of this enactment was not only to prohibit the sale or disposal of those articles to the Indians in the Indian country, but also to wholly prohibit their introduction into that country, excepting where they were taken there as military supplies under the direction of the War Department.

By the 2d section of the act of March 3, 1847, (9 Stat., 203,) amendatory of the 20th section of the act of 1834, imprisonment was added to the fines imposed by the latter section. Thus stood the law on this subject until the passage of the act of February 13, 1862, (12 Stat., 339,) which amended the 20th section of the act of 1834, so as to read as follows:

"That if any person shall sell, exchange, give, barter, or dispose of any spirituous liquor or wine to any Indian under the charge of any Indian superintendent or Indian agent appointed by the United States, or shall introduce or attempt to introduce any spirituous liquor or wine into the Indian country, such person, on conviction thereof before the proper district court of the United States, shall be imprisoned for a period not exceeding two years, and shall be fined not more than three hundred dollars: *Provided, however,* That it shall be a sufficient defense to any charge of introducing or attempting to introduce liquor into the Indian country, if it be proved to be done by order of the War Department or of any officer duly authorized thereto by the War Department," &c. The remainder of the provision is unimportant to the matter in hand.

That amendment was afterward re-enacted by the act of March 15, 1864, (13 Stat., 29,) which gave to the circuit court, also, cognizance of cases arising thereunder, but made

Indian Country.

no other material alteration therein; and, as thus re-enacted, it appears to be the only law now in force which is applicable to the subject under consideration. This law in effect declares that any person who introduces or attempts to introduce spirituous liquor into the Indian country is punishable by fine and imprisonment, except it "be done by order of the War Department or of any officer duly authorized thereto by the War Department." By fair implication, the introduction of spirituous liquor into the Indian country is prohibited wherever it is not done by authority of the War Department; and hence the authority of that Department touching the introduction of liquors into the Indian country would seem to be exclusive.

The question, What is Indian country within the meaning of the Indian intercourse laws? is one of less easy solution. By the act of March 30, 1802, (2 Stat., 139,) a boundary-line between the territory then allotted or secured by treaty to the Indians (which is therein designated as "Indian country") and the other territory of the United States was definitely established by metes and bounds, with a proviso, however, that the same might thereafter be varied by treaties with the Indians. From the multiplicity of these treaties, it in the course of time became difficult to ascertain precisely what were the limits of the Indian country. To remedy this inconvenience and render those limits more obvious and certain, the act of June 30, 1834, (4 Stat., 729,) in its 1st section, provided, "that all that part of the United States west of the Mississippi, and not within the States of Missouri and Louisiana or the Territory of Arkansas, and also that part of the United States east of the Mississippi River, and not within any State, to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country."

The understanding of the framers of the law of 1834 was, that the Indian country, as thereby defined, would embrace, 1st, the whole of the territory of the United States west of the Mississippi, not within the States of Missouri and Louisiana or the Territory of Arkansas; 2d, that part of the territory of the United States east of the Mississippi, not within any State, to which the Indian title remains unextinguished.

Indian Country.

(See report of committee, House of Representatives, No. 474, first session Twenty-third Congress, pp. 1, 10.) In the report just cited, it is remarked with reference to the Indian country, as defined in the 1st section of that act: "On the west side of the Mississippi its limits can only be changed by legislative act. On the east side of that river it will continue to embrace only those sections of country not within any State to which the Indian title shall not be extinguished. The effect of the extinguishment of the Indian title to any portion of it (*i. e.*, of the country east of the Mississippi) will be the exclusion of such portion from the Indian country."

Subsequently, the question arose as to whether the Territory of Oregon was within the limits of the Indian country west of the Mississippi, as described in the act of 1834; and Congress, apparently assuming that it was not, provided by the 5th section of the act of June 5, 1850, (9 Stat., 437,) as follows: "That the law regulating trade and intercourse with the Indian tribes east of the Rocky Mountains, or such provisions of the same as may be applicable, be extended over the Indian tribes in the Territory of Oregon." By the 7th section of the act of February 27, 1851, (9 Stat., 587,) it was also provided: "That all the laws now in force regulating trade and intercourse with the Indian tribes, or such provisions of the same as may be applicable, shall be, and the same are hereby, extended over the Indian tribes in the Territories of New Mexico and Utah." And recently, by the act of March 3, 1873, chap. 227, sections 20 and 21 of the act of 1834 were extended to and over "all the mainland, islands, and waters of the territory ceded to the United States by the Emperor of Russia, by treaty concluded at Washington on the 30th day of March, A. D. 1867, so far as the same may be applicable thereto."

From this legislation it would seem that, in the view of Congress, the Indian country *west* of the Mississippi, as defined in the act of 1834, was originally limited to the territory then belonging to the United States situated between that river and the Rocky Mountains, and not within the States of Missouri and Louisiana or the Territory of Arkansas. Respecting that part of the Indian country, it was the understanding of the framers of the act of 1834 that the limits

Indian Country.

thereof could only be changed by legislative enactment. I am not aware of the existence of any statute that, in direct terms, changes those limits. But the course of legislation since the date of that act, in opening up a great portion of that region to settlement, in establishing territorial governments there, and in the admission of new States formed therein, has doubtless had *the effect* to alter the limits referred to, or at least to very much restrict the applicability of the Indian intercourse laws within the district of country thereby described.

It will be observed that the acts of 1850 and 1851, cited above, do not declare the whole of the Territories of Oregon, New Mexico, and Utah to be Indian country, but extend the intercourse laws, or such provisions of the same as may be applicable, over the Indian tribes in those Territories respectively.

I think it unquestionable, both as regards the region west of the Mississippi, originally included within the limits of the Indian country by the act of 1834, and as regards the region formerly included within the Territories just mentioned, that all Indian reservations occupied by Indian tribes, and also all other districts so occupied to which the Indian title has not been extinguished, are Indian country within the meaning of the intercourse laws, and remain (to a greater or less extent, according as they lie within a State or a Territory) subject to the provisions thereof.

Whether a district to which the Indian title has been extinguished, or which is open to pre-emption, homestead, or other settlement, under the laws of Congress, situated in one of the Territories established within the same boundaries, may also, under any circumstances, be deemed Indian country and subject to the intercourse laws, I express no opinion, in view of the fact that a case* is pending before the Supreme Court

* NOTE.—The case referred to by the Attorney-General is that of the *United States vs. Bichard*, which was an appeal from a decree of the supreme court of Arizona Territory, on an information filed in behalf of the United States against the goods of Bichard, claiming the same as forfeited under the laws regulating trade and intercourse with the Indians. But the case did not come to a hearing on the merits before the United States Supreme Court; it having been dismissed by the latter during October term, 1873, for want of jurisdiction, because it was brought up by *appeal* instead of by writ of error.

Expatriation—Foreign Domicile—Citizenship.

of the United States in which the question is involved. I shall endeavor to procure an early hearing of the case referred to at the ensuing term, and will advise you of the decision of the court as soon as it is ascertained.

I return herewith the papers received.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,

Secretary of War.

EXPATRIATION—FOREIGN DOMICILE—CITIZENSHIP.

The declaration in the act of July 27, 1868, chap. 249, that the right of expatriation is "a natural and inherent right of all people," comprehends our own citizens as well as those of other countries; and where a citizen of the United States emigrates to a foreign country, and there, in the mode provided by its laws, formally renounces his American citizenship with a view to become a citizen or subject of such country, this should be regarded by our Government as an act of expatriation.

The selection and actual enjoyment of a foreign domicile, with an intent not to return, would not alone constitute expatriation; but where, in addition thereto, there are other acts done by him which import a renunciation of his former citizenship, and a voluntary assumption of the duties of a citizen of the country of his domicile, these together with the former might be treated as *presumptively* amounting to expatriation, even without proof of naturalization abroad; though the latter is undoubtedly the highest evidence of expatriation.

Obligations of the Government toward its citizens domiciled in foreign countries, who apparently have no intent to return, and who do not contribute to its support, considered; and likewise what should be regarded as evidence of the absence of an intent to return in such cases.

A naturalized citizen who resides abroad has the same right to the protection of the Government, and stands upon the same footing in all other respects, as a citizen by birth residing abroad.

Children born abroad of persons once citizens of the United States, but who have become citizens or subjects of a foreign power, are not citizens of the United States, nor, as such, entitled to their protection.

A native-born citizen of the United States who has been naturalized in a foreign country, and thus become a citizen or subject thereof, is to be regarded as an alien; and he cannot re-acquire American nationality, except in conformity to the laws of the United States providing for the admission of aliens to citizenship therein.

Expatriation—Foreign Domicile—Citizenship.

DEPARTMENT OF JUSTICE,

August 20, 1873.

SIR: I have the honor to acknowledge the receipt of your communication of the 6th instant, submitting for my official opinion certain questions hereinafter stated, to which I respectfully make answer as follows:

Question 1. The law-making power having declared that the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness, (15 Stat., 223,) should the Executive refuse to give effect to an act of expatriation of a citizen of the United States?

Answer. My opinion is that the affirmation, by Congress, that the right of expatriation is "a natural and inherent right of all people," includes citizens of the United States as well as others, and the Executive should give to it that comprehensive effect.

Question 2. May a formal renunciation of United States citizenship, and a voluntary submission to the sovereignty of another power, be regarded otherwise than as an act of expatriation?

Answer. Congress has made no provision for the formal renunciation of citizenship by a citizen of the United States while he remains in this country; but if such citizen emigrates to a foreign country, and there, in the mode provided by its laws, or in any other solemn and public manner, renounces his United States citizenship, and makes a voluntary submission to its authorities with a *bona-fide* intent of becoming a citizen or subject there, I think that the Government of the United States should not regard this procedure otherwise than as an act of expatriation.

Question 3. Can an election of expatriation be shown or presumed by an acquisition of domicile in another country with an avowed purpose not to return?

Answer. Residence in a foreign country and an intent not to return, are essential elements of expatriation; but to show complete expatriation as the law now stands, it is necessary to show something more than these. Attorney-General Black says, (9 Opin., 359,) that expatriation includes not only

Expatriation—Foreign Domicile—Citizenship.

emigration out of one's native country, but naturalization in the country adopted as a future residence.

My opinion, however, is that, in addition to domicile and intent to remain, such expressions or acts as amount to a renunciation of United States citizenship and a willingness to submit to or adopt the obligations of the country in which the person resides, such as accepting public employment, engaging in military services, &c., may be treated by this Government as expatriation, without actual naturalization. Naturalization is without doubt the highest, but not the only, evidence of expatriation.

Question 4. Ought the Government to hold itself bound to extend its protection, and exert its military and naval power for such protection, in favor of persons who have left its territories, and who reside abroad, without an apparent intent to return to them, and who do not contribute to its support?

Answer. Persons born in the United States, who, having left them, reside abroad, with no apparent intention of returning, and who do not contribute to their support, do not necessarily discharge the United States Government from its obligation to interpose for their protection in proper cases. Foreign domicile, which is substantially described in this inquiry, is not the equivalent of expatriation. When a citizen of the United States becomes domiciled in a foreign country, he becomes, as a general rule, subject to its laws and authorities, like one of its citizens; but if, by his acts or declarations, he continues to assert his United States citizenship, and takes no oaths or public or official obligations inconsistent therewith, it is the duty of the Government of the United States, though he may have at the time no real or apparent intent to return to them, to protect him against special acts of wrong or injustice by the Government of the country in which he resides, and from the imposition upon him by that government of duties which are exclusively due from its own citizens or subjects, or which may be inconsistent with his allegiance to the United States.

Question 5. What should constitute evidence of the absence of an intent to return in such cases?

Answer. When a citizen of the United States goes abroad without intending to return, he takes one indispensable step

Expatriation—Foreign Domicile—Citizenship.

towards expatriation ; but to effect a complete annihilation of all duties and obligations between the Government of his native country and himself, which expatriation implies, it is necessary that he should become a resident in some foreign country with an intent to remain there, superadded to which there must be acts in the direction of becoming a citizen or subject of such foreign country, amounting at least to a renunciation of United States citizenship. Absence of an intent to return to one's native country, or, to speak perhaps with more accuracy in considering a question of expatriation, an intent to remain in a foreign country, may be evidenced in various ways and by a great variety of circumstances, and though it might not be difficult to determine from the facts in a specific case as to the intent of a party changing his domicile, it is impossible to lay down any general rule upon the subject by which all cases can be decided. Intent is the great criterion by which the character of domicile is determined. When a person avows his purpose to change his residence, and acts accordingly, his declarations upon the subject are generally received as satisfactory evidence of his intent ; but, in the absence of such evidence, the sale of his property and the settling up of his business before emigration, the removal of his family if he has one, arrangements for a continuing place of abode, the acquisition of property after removal, the formation of durable business relations, and the lapse of a long period under such circumstances, are among the leading considerations from which the intent to make a permanent change of domicile is inferred.

Question 6. When a naturalized citizen of the United States returns to his native country, and resides there for a series of years, with no apparent purpose of returning, shall he be deemed to have expatriated himself, where the case is not regulated by treaty ?

Answer. Conflicting views have been advanced upon this question by distinguished lawyers and statesmen of this country, but I know of no principle upon which it can be held that, with respect to protection in foreign countries, the rights of a naturalized are different from those of a native-born citizen. Domicile in his native country without an intent to return to the United States, by a naturalized citi-

Expatriation—Foreign Domicile—Citizenship.

zen, would not of itself, so long as he maintains his claim and distinctiveness as such naturalized citizen, deprive him of his right of protection in proper cases by the Government of the United States. But less evidence would perhaps be requisite to show that a person residing in his native country had thrown off a foreign citizenship acquired by naturalization, or, in other words, had expatriated himself from his adopted country, than to show that a person born in the United States, but residing elsewhere, had expatriated himself from his native country. Naturalization effected in the United States without an intent to reside permanently therein, but with a view of residing in another country, and using such naturalization to evade duties and responsibilities that would otherwise attach to the naturalized person, ought to be treated by the Government of the United States as fraudulent, and as imposing upon it no obligation to protect such person; and as to this, the Executive must judge from all the circumstances of the case. Section 2 of the act of July 27, 1867, *supra*, as to protection in foreign countries, puts naturalized and native-born citizens upon the same ground.

Question 7. Are the children born abroad of a person who has been a citizen of the United States, but who has become a subject or citizen of another power, or who has expatriated himself, citizens of the United States, and entitled to its protection?

Answer. Section 1 of the act of February 10, 1855, (10 Stat., 604,) provides that "persons heretofore born or hereafter to be born out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of the United States, shall be deemed and considered, and are hereby declared to be citizens of the United States: *Provided, however,* That the rights of citizenship shall not descend to persons whose fathers never resided in the United States;" from which, as well as from other considerations, it is evident that children born abroad of persons once citizens of the United States, but who have become citizens or subjects of a foreign power, are not citizens of the United States, or, as such, entitled to their protection.

Question 8. Can a person who has formally renounced his allegiance to the United States, and assumed the obligations

Expatriation—Foreign Domicile—Citizenship.

of a citizen or subject of another power, become again a citizen of the United States in any other way than in the manner provided by general laws?

Answer. Persons born in the United States who have, according to the laws of a foreign country, become subjects or citizens thereof, must be regarded as aliens; and section 1 of the act of April 14, 1802, (2 Stat., 153,) declares that an alien may be admitted to become a citizen of the United States as provided in said act, and not otherwise. Actual naturalization abroad would seem to be necessary to make a person born in the United States an alien.

Section 1 of the 14th amendment to the Constitution declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." But the word "jurisdiction" must be understood to mean absolute or complete jurisdiction, such as the United States had over its citizens before the adoption of this amendment. Aliens, among whom are persons born here and naturalized abroad, dwelling or being in this country, are subject to the jurisdiction of the United States only to a limited extent. Political and military rights and duties do not pertain to them.

I have made the foregoing answers as specific as I can, to what are abstract propositions; but I beg to add, generally, that, in the absence of treaties and legislation by Congress touching the subjects involved in said questions, the rules of law relating thereto are to be drawn from writers upon international and public law, who do not always agree, and therefore it will be difficult for the Government to act upon any such rules without a chance of controversy.

Legislation is needed to declare by what acts United States citizenship is lost. According to the French Code, not only naturalization in a foreign country, but a fixed residence there without the intention of returning, destroys the quality of a Frenchman; and regulations to the effect that a subject by acts other than naturalization in a foreign country may expatriate himself have been adopted by Russia, Austria, Italy, and other countries of Europe. I can see no good reason why Congress may not put an end to controversy

Claims for use of Patents.

upon the subject by declaring that a citizen of the United States who emigrates to a foreign country with the avowed purpose of remaining there, or who resides abroad for a definite period without an avowed purpose of returning to the United States, shall be considered as thereby expatriating himself or losing the right to call upon the Government of the United States for protection during such foreign residence. Several treaties have been made with European powers to the effect that when a naturalized citizen renews his residence in his native country with intent to remain he shall be held to have renounced his naturalization; and something like this, it seems to me, might with great propriety be incorporated into the laws of this country, to be applied as well to our citizens who, having been naturalized abroad, return to reside in the United States, as to those who, naturalized here, return to reside in their native country.

Very respectfully,

GEO. H. WILLIAMS.

The PRESIDENT.

CLAIMS FOR USE OF PATENTS.

Where claims presented to the Secretary of War for the use of certain patents were not based upon contracts, and involved questions proper for judicial rather than executive determination: *Advised* that he ought not to act upon them officially until the questions referred to are settled.

DEPARTMENT OF JUSTICE,

September 22, 1873.

SIR: Your letter of the 3d instant states that you are in receipt of certain claims based upon alleged infringement by the United States authorities in the manufactures at the National Armory at Springfield, Massachusetts, and that as the settlement of these claims seems to require the previous decision in each case of the questions, (1) whether infringement of patent-rights has actually occurred, and (2) in whom rests the lawful and exclusive ownership of the device under the patent-laws, you desire my opinion as to "the expediency of declining, under the circumstances, the settlement of the claims until the facts of infringement, and especially lawful and exclusive ownership in each case, are judicially proved."

•

Case of Hutchinson, Kohl & Co.

These claims, arising not upon contract with your Department, but upon alleged infringement of patent-rights, are for compensation for a tortious use of what is asserted by the claimants to be private property, and the total compensation demanded, as appears from papers accompanying your letter, is computed by them at a rate fixed by themselves and designated as "royalty."

While you may in the exercise of your discretion as an executive officer, where there is no question as to the ownership of a patent, contract for its use in the Government service and allow accounts in accordance with the contract, you are not authorized in the cases presented to adjust what is in the nature of a claim for unliquidated damages. Such claims are the subject of judicial, not of executive, inquiry and determination.

Further, the questions you suggest as being involved in these cases indicate the existence of a controversy concerning the ownership of the particular patent or patents which are in use, as alleged, without the consent of the owners.

Pending such controversy neither party could reasonably expect, even upon a contract for use, to receive compensation by an allowance of your Department. A judicial settlement of all the questions involved, it is clear, must be sought, as well to determine the matters in dispute between themselves as the merits of the claims made against the United States.

In my judgment, therefore, it is not only not expedient, but you are not authorized, at this time, to allow the claims in question.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon Wm. W. BELKNAP,
Secretary of War.

CASE OF HUTCHINSON, KOHL & CO.

The buildings in Alaska, consisting of warehouses, store-houses, blacksmith-shops, cooper-shops, fish-houses, dwelling-houses, &c., purchased by Hutchinson, Kohl & Co. from the Russian-American Company in March, 1868, were not included in the cession made by Russia to the United

Case of Hutchinson, Kohl & Co.

States in the treaty of March 30, 1867, and did not become the property of the latter under that treaty.

But the Russian-American Company never had anything more than the use of the land on which its buildings stood—the *dominium*, or right of property therein, ever remaining in the government of Russia; and by the 6th article of the treaty the right of possession, use, and all other privileges which that company then enjoyed in the soil, were in effect extinguished; so that the United States acquired under the said cession the absolute proprietorship of all the lands on which the establishments of that company were located, and as a consequence the latter could occupy such lands thereafter only by the sufferance of the Government of the United States.

Hence, although the ownership of the buildings referred to may be in Hutchinson, Kohl & Co., under their purchase from the Russian-American Company, they acquired no interest whatever in the soil by the purchase of such buildings; they are simply occupants of the public domain, without right or title, and at the sufferance of the Government.

DEPARTMENT OF JUSTICE,
September 27, 1873.

SIR: I have examined the papers submitted to me under cover of your communication of the 15th ultimo, touching the right of the United States to certain buildings in Alaska, which are claimed by Messrs. Hutchinson, Kohl & Co. under a purchase alleged to have been made by them from the Russian-American Company in March, 1868.

It appears by a schedule found with the papers that the buildings referred to are located at fifteen different posts or places in Alaska, and that they consist of warehouses, store-houses, blacksmith-shops, cooper-shops, fish-houses, boat-houses, cow-houses, salt-houses, and dwelling-houses. You inform me that it has heretofore been claimed by your Department that the title to this property vested in the United States, under the treaty with Russia of March 30, 1867, ceding to the United States the Russian possessions in North America, (15 Stat., 539,) and you desire an expression of my views as to the validity of that claim.

By the provisions of the 1st article of the treaty, Russia cedes to the United States all the territory and dominion possessed by the former on the continent of America and in the adjacent islands contained within certain geographical limits therein set forth.

The 2d article declares that in the cession made by the

Case of Hutchinson, Kohl & Co.

preceding article "are included the right of property in all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private individual property." But churches built in the ceded territory by the Russian government are to remain the property of such members of the Greek Oriental Church resident in the territory as may choose to worship therein.

In the 6th article, the cession is declared to be "free and unincumbered by any reservations, privileges, franchises, grants, or possessions, by any associated companies, whether corporate or incorporate, Russian or any other, or by any parties except merely private individual property-holders," and it is furthermore declared to convey all the rights, franchises, and privileges belonging to Russia in the said territory or dominion and appurtenances thereto.

The 4th article provides for the appointment on the part of Russia of an agent or agents for the purpose of formally delivering to a similar agent or agents appointed on behalf of the United States, the "territory, dominion, property, dependencies, appurtenances," ceded, &c.; but by the same article the cession, with the right of immediate possession, is nevertheless to be deemed "complete on the exchange of ratifications, without waiting for such formal delivery."

The foregoing would seem to embrace all the provisions of the treaty which have any relation to or bearing upon the subject presented.

The Russian-American Company, from which the purchase of the buildings in question is alleged to have been made by Hutchinson, Kohl & Co., was a trading company, chartered by the Emperor of Russia, and at the period when the treaty was entered into appears to have enjoyed, under a grant contained in its charter, the exclusive possession and use of the territory included in the cession. This company had also been invested with governmental powers over the whole region, which were administered through its officers and agents. Its establishments there were in part of a public and in part of a private character; the former comprising such buildings and structures as were erected for purposes of administration, police, military defense, and the like, and the latter com-

Case of Hutchinson, Kohl & Co.

prising such as were erected more especially for the purpose of carrying on its trading operations.

The company was authorized to allot their employés such lands as they needed for their housekeeping and other requirements, but it does not seem to have possessed the capacity to acquire for itself any title to the soil. It enjoyed nothing more than the use of the land on which its buildings stood, the dominion or right of property therein remaining with the government of Russia.

In the 6th article of the treaty, as has been already observed, the cession of "territory and dominion" therein made is declared to be "free and unencumbered by any reservations, privileges, franchises, grants, or possessions, by any associated companies, whether corporate or incorporate, Russian or any other, or by any parties, except merely private individual property-holders," &c. The effect of this provision undoubtedly was to extinguish the rights of possession and use and all other privileges which the Russian-American Company then held in the *territory* ceded; so that the United States acquired such territory wholly discharged therefrom, and became absolute proprietor of all the lands occupied by the establishments of that company.

Did the ownership of the buildings constructed by the Russian-American Company pass with the lands on which they were erected? That such was not the understanding of those who made the treaty is obvious from the fact that a separate provision was made for the transfer of a certain class of buildings.

By the 2d article of the treaty the cession includes "all public buildings, fortifications, barracks, and other edifices which are not private individual property." It is very clear that this language comprehends all structures of a public character (*i. e.*, those used or intended to be used for governmental purposes) which had been erected by the company. But that it was not designed to comprehend other structures built thereby, of a private character, (*i. e.*, those used or intended to be used for purposes of trade simply, such as the buildings alleged to have been purchased by Hutchinson, Kohl & Co.,) is, I think, evident from the subsequent action of

Case of Hutchinson, Kohl & Co.

both governments, parties to the treaty, in carrying it into effect.

Thus, in the instructions given by the Government of Russia to the Russian agent or commissioner, appointed in pursuance of the 4th article of the treaty, the following directions with regard to the formal transfer of the ceded territory appear: "3. All the forts and military posts will be delivered at once to the American military forces that may follow the United States commissioner," &c.; "4. The public buildings, such as the governor's house, the buildings used for governmental purposes, dock-yard, barracks, hospitals, schools, public grounds, and all free lots at Sitka and Kodiak, will be delivered," &c.; "5. All the houses and stores forming private property will remain to be disposed of by their proprietors." "To this same category belong smiths', joiners', coopers', tanners', and other similar shops, as well as ice-houses, saw and flour mills, and any small barracks that may exist on the islands."

The instructions given by the Government of the United States to the American commissioner appointed in pursuance of the same article of the treaty contain the following directions respecting the formal transfer of the territory: "Pursuant to the stipulations of the treaty, that transfer will include all forts, and military posts, and public buildings, such as the governor's house and those used for government purposes, dock-yards, barracks, hospitals, and schools, all public lands, and all ungranted lots of ground at Sitka and Kodiak. Privatedwellingsandwarehouses, blacksmiths', joiners', coopers', tanners', and other similar shops, ice-houses, flour and saw mills, and any small barracks on the islands are subject to the control of their owners, and are not to be included in the transfer to the United States."

From the instructions given by each government it is manifest that the provisions of the treaty, so far as they relate to the transfer of buildings in the ceded territory, were at the very beginning understood by both parties thereto in substantially the same sense and as having the same effect, and that according to this understanding all houses and structures, of whatever kind, destined for private purposes, and falling within the category of private property, were excluded.

Case of Hutchinson, Kohl & Co.

from such transfer, and left in the ownership of those to whom they then belonged.

No doubt appears to have been entertained by any one at the time that property of the character just mentioned was excepted from the operation of the treaty; but it has since been suggested that the exception only applied to such property as was owned by natural persons, and not to that possessed by incorporated companies; and upon this idea, as it seems, rests the claim heretofore asserted by your Department, that the title to the buildings in question passed under the treaty to the United States. In support of the view here adverted to, the provisions already quoted from the 2d and 6th articles of the treaty are relied upon.

As to the 6th article, however, it is plain that the provisions thereof only contemplate rights and privileges within the territory which adhere to or concern the soil or domain, and do not apply to proprietary interests in the houses and structures thereon erected. The latter are separately and specially provided for in the 2d article. By the provisions of this article edifices which are "private individual property" are not included in the cession; and it appears that the words "private individual property" there employed have been taken in your Department to mean property owned by individual persons, in contradistinction from property owned by associated or incorporated companies.

This construction, regard being had to the objects of the treaty, is obviously too narrow; for the transfer and acquisition of buildings erected for purposes of trade and other merely private uses certainly cannot be reckoned as among those objects. It seems to me that the phrase mentioned must be taken to refer to property pertaining to individuals, whether associated or not, including also artificial persons or corporations, as distinguished from property pertaining to the public, and that it is not to be understood in a less comprehensive sense than the terms "private property" simply, which unquestionably embrace property of the former description.

There are instances in treaties of cession where similar phraseology has been used in the full sense of those terms. On reference to the 2d article of the treaty with France, of

Case of Hutchinson, Kohl & Co.

April 30, 1803, we find in the French version a cession of "tous les bâtiments publiques, fortifications, casernes et autres edifices qui ne sont *la propriété d'aucun individu*." (8 Stat., 203.) So in the 2d article of the treaty with Spain of February 22, 1819, the Spanish version contains a cession of "edificios publicos, fortificaciones, casernas y otros edificios, que no sean *propriedad de algun individuo particular*." (8 Stat., 255.) The passages underscored, interpreted according to the literal meaning of the words, might perhaps be considered to signify property in the ownership of natural individual persons, exclusively of that owned by companies or corporations or by the public. But when interpreted according to the intention of the respective parties they evidently mean private property, and that in an unqualified sense. This is shown by the circumstance that the expression "private property" is made use of without any qualification in the corresponding provisions of the English version of the same treaties. (8 Stat., 202, 254.)

To construe the treaty in question, at the time of its execution, was the province of the State Department; and that Department having made and published its construction, upon which the Government took definite action, it would seem that another Department of the Government would be hardly justified in afterward reversing that construction, because some doubts were raised as to its correctness.

Hutchinson, Kohl & Co., finding the buildings which they purchased in the hands of the Russian-American Company after the transfer under the treaty had been fully made, and having knowledge, as it may be presumed, of the instructions given by both governments to their commissioners, declaring in effect that these buildings were the property of the company, purchased and paid for the same in good faith, and it would now be unjust, if not illegal, for the Government to deprive them of this property on the alleged ground that there was error in the decision in pursuance of which the purchase was made. As against the claim of a private party, acts under similar circumstances would amount to an equitable estoppel.

It is also suggested that \$200,000 was added to the \$3,000,000 purchase-money first agreed upon, to indemnify the Russian-

Case of Hutchinson, Kohl & Co.

American Company for the buildings in question; but in addition to the franchises given up by that company they had constructed a great number of public works and buildings, which were transferred by the treaty, and which account for the payment of the \$200,000.

The conclusions at which I arrive, and which seem to be fairly deducible from the foregoing considerations, are that the ownership of *some* only of the buildings of the Russian-American Company passed under the disposition made by the treaty to the United States, viz, those used for governmental or public purposes; that the ownership of other buildings of the same company, viz, those used for trading and other merely private purposes, did not thus pass; and consequently that, as the buildings alleged to have been purchased from that company by Hutchinson, Kohl & Co. appear to belong to the latter class, these never became property of the United States by virtue of the treaty; and if there was any doubt about this, I do not think the Government can rightfully claim the structures in question, in view of the circumstances under which the treaty was executed and the purchase made by Hutchinson, Kohl & Co. But though the ownership of the buildings in dispute was left by the provisions of the treaty in the Russian-American Company, yet as all right or interest which the company had in the land on which they were erected was extinguished, and the title thereto transferred, free and unincumbered, to the United States, the company could not by reason of its ownership of those buildings thereafter occupy such land except by the sufferance of the Government of the United States, and the parties who may have since purchased the buildings from the company would seem to stand in the same situation relatively to the Government. They are simply occupants of the public domain without title, and where there is no law providing for the acquisition of title from the United States.

The papers received with your communication are herewith returned.

I have the honor to be, very respectfully,

GEO. H. WILLIAMS.

Hon. WM. A. RICHARDSON,

Secretary of the Treasury.

Transportation under the Treaty of Washington.

TRANSPORTATION UNDER THE TREATY OF WASHINGTON.

So much of article 30 of the treaty between the United States and Great Britain, of the 8th of May, 1871, called the Treaty of Washington, as relates to the transportation of merchandise in British vessels, without payment of duty, from one port or place within the territory of the United States to another port or place within the same territory, examined and construed.

Under the provisions of that article a British vessel may, during a single voyage, ship merchandise at two or more ports of the United States in succession on the river Saint Lawrence, the Great Lakes, and the rivers connecting the same—the merchandise being destined for other ports of the United States, and to be carried part of the way through Canada by land, in bond—and after thus completing her cargo sail to the port or place in Canada where the land-carriage is to begin.

Such vessel may also, after taking a cargo of merchandise aboard at a Canadian port, to which the same had been transported from a port of the United States part of the way overland in bond and part of the way by water in the manner above indicated, sail thence to two or more ports of the United States on the above-mentioned waters, in succession, during a single voyage, and deliver at each port whatever part of the cargo is consigned thereto.

DEPARTMENT OF JUSTICE,

October 13, 1873.

SIR: I have the honor to acknowledge the receipt of your letter of the 8th instant, in which you submit for my official opinion the following questions:

“1. Can a British vessel call at Du Luth and Marquette, (for instance,) being two ports in the territory of the United States upon the Great Lakes, or any other two ports upon the Saint Lawrence, the Great Lakes, or the rivers connecting the same, in succession, on the same voyage, without having in the interval entered at a British port?

“2. Can a British vessel, laden with goods from one port or place within the territory of the United States, upon the Saint Lawrence, the Great Lakes, and the rivers connecting the same, land a portion of such goods at another port or place within the territory of the United States as aforesaid, without payment of duty, and then on a continuous voyage land another portion of such goods at still another port or place within the United States as aforesaid, it being understood in such case that a portion of the transportation has

Transportation under the Treaty of Washington.

been made through the dominion of Canada by land-carriage and in bond, under rules and regulations that may have been agreed upon between the two governments? For instance, goods shipped in a British vessel at Oswego to some point in Canada on Lake Ontario, thence transported through Canada by land and in bond, under regulations as above stated, to some point on Lake Huron, thence again shipped in a British vessel, part of the goods being destined, say, for Marquette and part for Du Luth—can the landing free of duty be made of one part of the goods at Marquette and of the other part at Du Luth in the same voyage?

“3. Can a British vessel, under the treaty, carry goods free of duty to an American port or place on the above-mentioned waters, which goods, although transported through Canada by land-carriage and in bond, had been shipped on a British vessel in part at one American port or place and in part at another American port or place, the vessel having, after shipping the former part, proceeded to a British port without discharging her cargo, and then gone to the latter port and taken on board the other part of such goods?”

That paragraph of article 30 of the treaty of Washington (17 Stat., 873) upon which these questions arise is as follows: “It is agreed that, for the term of years mentioned in article 33 of this treaty, subjects of her Britannic Majesty may carry in British vessels, without payment of duty, goods, wares, or merchandise from one port or place within the territory of the United States upon the Saint Lawrence, the Great Lakes, and the rivers connecting the same, to another port or place within the territory of the United States as aforesaid: *Provided*, That a portion of such transportation is made through the dominion of Canada by land-carriage and in bond, under such rules and regulations as may be agreed upon between the Government of her Britannic Majesty and the Government of the United States.”

Subject to those rules and regulations which may be agreed upon between the two governments as to land-carriage, my opinion is that a British vessel proposing to sail for some port in Canada may take on at Du Luth goods, wares, or merchandise destined to some other port of the United States, and to be carried in part by land-carriage through Canada,

Transportation under the Treaty of Washington.

and may then proceed directly to Marquette and take on other goods, wares, or merchandise to be carried in like manner, and so on from port to port in the United States until her cargo is complete, thence to sail to the point where the land-carriage for such goods, wares, or merchandise through Canada is to commence; and so also a British vessel, after receiving a cargo of goods, wares, or merchandise at some place in the dominion of Canada to which they have been transported from a port in the United States, first by a British vessel and then by land-carriage through Canada, may proceed to Marquette and there discharge any part of said cargo consigned to that port, and then proceed to Du Luth and discharge the balance of such cargo if consigned to that port, and so with other ports of the United States, *mutatis mutandis*.

British vessels upon the waters named in the treaty have no right, by virtue thereof, to enter ports of the United States or do business therein otherwise than as provided by acts of Congress, except to receive goods, wares, or merchandise that are to be carried, or to discharge goods, wares, or merchandise that have been carried, by land through Canada, and that are to be or have been transported in accordance with the other requirements of said treaty.

Doubts probably have arisen as to the precise meaning to be given to the words "one" and "another" in said paragraph. "One" here, as it seems to me, is used not in a numerical, but in a reciprocal sense. It is not employed to exclude all but a single port from the operation of the treaty; but it is employed simply to contradistinguish the place of shipment from the place of delivery, with land-carriage through Canada intervening. If the words "between" ports or places of the United States had been employed, or had the word "any" instead of "one" been used, I think the intent of those who made the treaty would have been expressed with equal if not with greater accuracy.

When a British vessel discharges its cargo, or any part thereof, at any port on Lake Michigan, or other port of the United States on said waters, if it appears that such cargo, or said part thereof, has been carried by a British vessel from some other port of the United States, and across Canada by land, the goods, wares, or merchandise so discharged are

Telegraph along the Kansas Pacific Railroad.

exempt from duty; and it makes no difference, in my opinion, where such vessel has been or proposes to go, after having received said freight for delivery as aforesaid. To benefit British shipping was no doubt one object of that part of the treaty in question; but another and paramount object of it was, so far as the United States are concerned, to afford, as far as practicable thereby, increased facilities for transportation between the great grain-growing States of the West and the Atlantic seaboard.

I think it would be a too narrow construction of the clause in question to hold that freight received by railroad at Sarnia, or some other port similarly situated, duly transported thereto according to the treaty, sufficient for a single cargo only, but destined to six different American ports, must be dispatched in six British vessels when it could be carried in one, if allowed to sail from port to port for purposes of delivery.

Section 33 of the act of March 2, 1799, (1 Stat., 625,) provides that vessels from foreign ports may proceed from district to district in the United States for the purpose of delivering freight; and this, I think, the treaty allows British vessels to do in the waters therein named free of duty, provided the freight to be discharged from such vessels has been carried by a British vessel from a port of the United States to, and then by land across, Canada.

Subject to such modifications as these views may make, I return an affirmative answer to each of your questions.

Very respectfully,

GEO. H. WILLIAMS.

Hon. HAMILTON FISH,
Secretary of State.

TELEGRAPH ALONG THE KANSAS PACIFIC RAILROAD.

Statutory provisions relating to the establishment of the telegraph-line along the route of the Kansas Pacific Railroad and the payment of compensation for the transmission of dispatches over the same, reviewed. One-half of the compensation chargeable for sending such dispatches over that line should be retained and applied to the payment of the bonds issued by the United States in aid of said railroad, notwithstanding that

Telegraph along the Kansas Pacific Railroad.

at the time the dispatches were sent the line was actually managed and operated, not by the Kansas Pacific Railroad Company, but by the Western Union Telegraph Company, and the service was rendered directly to the Government by this company.

DEPARTMENT OF JUSTICE,
October 13, 1873.

SIR : In a communication to you, dated the 16th of January last, touching the subject of compensation for services rendered by the Western Union Telegraph Company in the transmission of Government dispatches over the lines operated by that company along the routes of the Kansas Pacific Railroad, the Union Pacific Railroad, and the Central Pacific Railroad, I had the honor to state my views upon the questions previously submitted to me by you in connection with that subject so far as it relates to the lines along the route of the two last-mentioned railroads. (See *ante*, p. 173.) But inasmuch as it appeared from the papers then before me that the line of telegraph operated by that company along the route of the Kansas Pacific Railroad Company was built and worked under some arrangement between these two companies, the particulars of which were not contained in those papers, I deferred the expression of any opinion upon the question with reference to this line until more specific information concerning that arrangement should be put in my possession.

I have since received from your Department a copy of an agreement between the two companies last referred to, relative to the construction and working of the telegraph-line along the route of the Kansas Pacific Railroad, executed on the 1st of October, 1866, which supplies the information needed, and enables me now to give you my views on the aforesaid question as it respects that line.

The question which I propose to consider here is, whether one-half of the compensation chargeable for the transmission of Government dispatches over the telegraph-line just mentioned should be retained and applied to the payment of the bonds issued by the United States in aid of the construction of the Kansas Pacific Railroad.

A brief statement of the provisions of the Pacific Railroad acts, relating to the establishment of telegraph-lines and the payment of compensation for the transmission of Government

Telegraph along the Kansas Pacific Railroad.

dispatches over the same, was given in my communication above alluded to. But, for the sake of convenience, I will again state so much of those provisions as appear to have any bearing upon the matter in hand.

By the 9th section of the act of July 1, 1862, the Leavenworth, Pawnee and Western Railroad Company of Kansas (afterwards known as the "Union Pacific Railroad Company, Eastern Division," and now called the "Kansas Pacific Railway Company") was authorized to construct "a railroad and telegraph-line * * * upon the *same terms and conditions in all respects* as are provided" in that act for the construction of the railroad and telegraph-line of the Union Pacific Railroad Company. (12 Stat., 493, 494.)

Among these terms and conditions are the following: (see sections 2, 3, 5, and 6 of same act:) 1st. A grant by the United States of the right of way through the public lands, &c. 2d. A grant by the United States of a certain number of alternate sections of the public lands per mile on each side of the railroad on the line thereof. 3d. The issue by the United States to the company of a certain amount of bonds bearing interest. 4th. The said grants to be made upon condition that the company "shall keep said railroad and telegraph-line in repair and use, and shall at all times transmit dispatches over said telegraph-line * * * for the Government whenever required to do so by any Department thereof, and that the Government shall at all times have the preference in the use of the same for all the purposes aforesaid, (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service;) and all compensation for services rendered for the Government shall be applied to the payment of said bonds and interest until the whole amount is fully paid."

The provision of the act of 1862 requiring "all compensation for services rendered for the Government" to be applied to the payment of said bonds, &c., was amended by the 5th section of the act of July 2, 1864, so as to require only one-half of such compensation to be thus applied, (13 Stat., 358, 359;) and by the 9th section of the act of March 3, 1871, the Secretary of the Treasury was directed to pay over in money to the railroad companies performing such services one-half of the

Telegraph along the Kansas Pacific Railroad.

compensation therefor, at the rate provided by law. (16 Stat., 525.) This relates to services theretofore as well as thereafter rendered. The direction given to the Secretary by the 2d section of the recent act of March 3, 1873, (17 Stat., 508,) to withhold all payments to any railroad company, &c., being in terms restricted to payments on account of "freight or transportation," made no change in the law respecting payments for telegraph-service performed by such company for the Government, but left that as it previously stood.

In addition to the provisions already cited from the act of July 1, 1862, I may also mention another, made by the 19th section of that act, which reads as follows: "That the several railroad companies herein named are authorized to enter into an arrangement with the Pacific Telegraph Company, the Overland Telegraph Company, and the California State Telegraph Company, so that the present line of telegraph between the Missouri River and San Francisco may be moved upon or along the line of said railroad and branches as fast as said roads and branches are built, and if said arrangement be entered into, and the transfer of said telegraph-line be made in accordance therewith to the line of said railroad and branches, such transfer shall, for all purposes of this act, be held and considered a fulfillment on the part of said railroad companies of the provisions of this act in regard to the *construction* of said line of telegraph. And in case of disagreement, said telegraph companies are authorized to remove their line of telegraph along and upon the line of railroad herein contemplated, without prejudice to the rights of said railroad companies named herein."

By the contract above mentioned, the Union Pacific Railway Company, Eastern Division, (now the Kansas Pacific Railway Company,) agreed to pay to the Western Union Telegraph Company the cost of the telegraph-poles then erected along the railway company's road between Wyandotte and Fort Riley, except such as had been furnished and erected by the railway company; and also to pay the cost of the wires and insulators for a telegraph-line, with one wire, between those points, except for such portion of the distance as the railway company had already provided the articles named. The railway company furthermore agreed to furnish

Telegraph along the Kansas Pacific Railroad.

and distribute along their road, west of Fort Riley, as fast as it was completed, suitable poles for a first-class telegraph-line, together with wire and insulators for a line of one wire ; also to supply and distribute like suitable telegraph-poles as they should be required, from time to time thereafter, to repair and renew the line when necessary ; also to transport free of charge all persons engaged in and materials required for the construction, reconstruction, working, repairing, and maintaining said telegraph-line, &c.

The Western Union Telegraph Company, on the other hand, agreed to erect the poles, attach the insulators, and string the wire to be furnished by the railway company, as fast as each section of twenty miles of the railroad should be completed, in the manner required for a first-class telegraph-line, "and so as to be accepted by the Government commissioners ;" and to furnish all main batteries required for the efficient working of the telegraph, and keep the line in good working order without expense to the railway company except for the materials, which, by the terms of the agreement, the latter were to supply. It was also agreed that the first wire should belong to the railway company and be for its use exclusively after a second wire was put up ; but that no "commercial or paid business" should be transmitted by the railway company from any station where the telegraph company had an office, without the consent of the latter ; and the railway company was to account to the telegraph company for the amount of its receipts from such business. The telegraph company was to have the right to add as many wires to the line as should be necessary for the transmission of their own business, but without expense to or interference with the working of the wires of the railway company, and the latter company was to have the same right. All business of the railway company was to be transmitted by the telegraph company free of charge, and the telegraph company also agreed "to perform, without charge, for the railway company, what shall be decided by competent authority to be its telegraph obligations to the Government of the United States."

The foregoing presents substantially the leading provisions of the contract, the duration of which is by its terms declared to be for the "full term of twenty-five years from the first

Telegraph along the Kansas Pacific Railroad.

day of October, 1866, and until one year's notice of its expiration shall have been given by one of the parties" thereto.

This contract, as it would seem, is not an arrangement entered into under section 19 of the act of 1862, quoted above, for the removal or transfer of a portion of "the (then) present line of telegraph between the Missouri River and San Francisco" upon or along the line of the railway. The subject-matter of the agreement rather appears to be the construction, working, and keeping in repair of a new telegraph-line, one which, in the absence of such an arrangement as that just mentioned, the railway company was bound, by its acceptance of the terms and conditions of the statute, to establish along the line of its road.

Both the contracting parties obviously contemplated that the telegraph-line to be constructed under the agreement should be offered to the Government as a fulfillment on the part of the railway company of its obligation in regard to the establishment of a telegraph-line along its road; for by the terms of the instrument it was to be constructed "so as to be accepted by the Government commissioners;" and I assume that the line on its completion was thus offered to the Government, and accepted thereby.

Regarding the line, then, from this point of view, namely, as one which was constructed by or for the railway company in fulfillment of the obligation which it had incurred by its acceptance of the terms and conditions of the statute before referred to, it manifestly became the duty of the company to transmit dispatches over the same for the Government whenever required to do so by any Department thereof, at fair and reasonable rates of compensation, one-half of which compensation was to be applied to the payment of the said bonds and interest.

Now, the transmission of dispatches for the Government, as the needs of the public service may require, is one of the main purposes to accomplish which the telegraph-franchise was conferred and the line authorized to be established by Congress. This purpose is inseparable from the establishment and maintenance of the line, and cannot be defeated by a change in the management thereof. The failure or refusal to carry it out would be sufficient ground for judicially declaring and

Telegraph along the Kansas Pacific Railroad.

enforcing a forfeiture of the franchise on which both the right to establish and maintain and the right to operate the line necessarily depend. (See opinion of Attorney-General Hoar in the case of the *Central Pacific Railroad Company*, 13 Opin., 87.) Hence, the performance of the duty of transmitting Government dispatches, which, as we have seen, originally rested upon the railway company, would seem to legally devolve upon any party with whom that company might contract to manage and work the line, or to whom it might lease or assign the same, irrespective of any special undertaking by such party for its performance. And moreover, since the statute expressly provided at what rate and in what mode this service shall be compensated, the right of such party upon performing the service, in respect to compensation therefor, would be subject to the same provision of law.

In the case under consideration, the telegraph company, by agreement with the railway company, appears to have undertaken to perform for the latter the service just mentioned, and that, too, free of charge. But I do not rest the obligation of the telegraph company, while in the management of the line, to transmit Government dispatches over the same, upon that agreement. It is imposed on the company, as I conceive, by force and effect of the statute authorizing the establishment of the line, and must be discharged subject to the terms, as to compensation, which the statute prescribes.

My conclusion, therefore, is that one-half of the compensation chargeable for sending Government dispatches over the said telegraph-line, along the Kansas Pacific Railroad, should be retained and applied to the payment of the bonds issued by the United States in aid of that railroad, notwithstanding the circumstance that at the time the dispatches were sent the line was managed and operated by the Western Union Telegraph Company, and the service was rendered directly to the Government by this company.

I am, sir, very respectfully, your obedient servant,
GEO. H. WILLIAMS.

HON. WM. W. BELKNAP,
Secretary of War.

Fort Gratiot Military Reservation.

FORT GRATIOT MILITARY RESERVATION.

The "Chicago, Detroit and Canada Grand Trunk Junction Railroad Company" has acquired under the act of February 8, 1859, chap. 26, a valid right to use, or easement in, so much of the Fort Gratiot military reservation as is described in the deed to that company executed by the Secretary of War on the 8th of March, 1859, for railroad purposes.

The "Port Huron Street Railway Company" has no right by virtue of the grant made thereto by the Secretary of War under the joint resolution of January 31, 1866, [No. 5,] to use any part of the land within said reservation which is covered by the right or easement held by the former company.

DEPARTMENT OF JUSTICE,
October 18, 1873.

SIR: I have examined the papers submitted to me under cover of your communication of the 3d instant, touching the right and privilege of certain railroad companies in and upon the Fort Gratiot military reservation.

The case presented by these papers and by your communication appears to be, in substance, as follows:

By act of February 8, 1859, (11 Stat., 381, 382,) Congress granted the *right of way through* and the *privilege of constructing depots and workshops* on the said reservation to any railroad company or companies which might construct a railroad or railroads from any place in the State of Michigan to or near the village of Port Huron, in said State; subject, however, to certain *provisoes*, one of which was, that, in the opinion of the President, such grant be not injurious to the purposes of public defense, and that "the location of said buildings on, and such road or roads as to position and width through, said reservation, and the price of the land to be so occupied, being first determined by the Secretary of War, be approved by the President."

On the 8th of March, 1859, the Secretary of War executed a deed in behalf of the United States, which was approved by the President, granting to the Chicago, Detroit and Canada Grand Trunk Junction Railroad Company, subject to the terms and conditions of said act, three tracts or parcels of land situated within the limits of the reservation and designated by reference to a description thereof given and plat attached to the deed; the whole comprising about 47 $\frac{57}{100}$ acres

Port Gratiot Military Reservation.

of land, for which the consideration of \$150 per acre was paid by said company.

This instrument contains a recital, wherein, after referring to the aforesaid act, it is stated that the grantee, the above-named railroad company, had located, surveyed, and marked out by a line of stakes its road through the reservation, and also the grounds required by it for the other purposes contemplated by the act; that the location of the depots and workshops to be constructed on the reservation, and the road of the company as to position and width through the same, and the price of the land to be occupied, had been determined by the Secretary of War and approved by the President.

Subsequently, by joint resolution, January 31, 1866, (14 Stat., 348,) Congress authorized the Secretary of War to grant to Guerdon O. Williams and his associates the use of so much of the said reservation "as is necessary for extending a horse-railroad from Port Huron City to the depot of the Port Huron and Detroit Railroad, at such rental and upon such terms and conditions as to him may seem proper," &c. Under the authority thus conferred the Secretary, by deed dated the 6th of August, 1866, granted to the said Williams and his associates the use of a part of the reservation, described as follows: "Beginning at the intersection of the south line of the military reserve with the prolongation of the middle line of the Huron avenue, so called, in the city of Port Huron, and running from said point north, 3° 34' 30" west, 1,221 feet; thence north, 20° 54' west, 2,205 feet; thence north 16° 23' west, parallel with the west line of the Grand Trunk Railroad Company's land, 970 feet, to intersect the south line of said railroad running through said reservation, and 20 feet on each side," &c.

The strip of land described in this last deed does not extend within the boundaries of either of the tracts granted by the above-mentioned deed to the Chicago, Detroit and Canada Grand Trunk Junction Railroad Company. But it seems that the proprietors of the horse street-railroad, *acting under a license obtained from that company*, constructed a portion of their track on the land previously granted to the latter as aforesaid. The license, however, was to continue only until the use of the land should be desired by the company grant-

Fort Gratiot Military Reservation.

ing it. Recently the street-railway company was requested by the Chicago, Detroit and Canada Grand Trunk Junction Railroad Company to remove its track from the land just referred to, and having declined to do so, the latter company proceeded to remove the same, but the commanding officer at Fort Gratiot interfered and prevented the removal. This interference on the part of the military authorities at that post has given rise to an appeal to your Department in behalf of the Chicago, Detroit and Canada Grand Trunk Junction Railroad Company.

In connection with this matter, the following questions are proposed, or suggested, in your communication, for my views thereon:

"1. Did the Secretary of War in his deed of March 8, 1859, granting to the said railroad company certain tracts of land situated in the said reservation, exceed the authority contained in the law of February 8, 1859 ?

"2. Under the act referred to, has the said railroad company an exclusive right of way over the land granted to it in the deed referred to and designated by red lines in the accompanying plat ?

"3. Whether or not the Port Huron Street-Railway Company has a right, under the joint resolution of January 31, 1866, to use any part of the lands conveyed to the Chicago, Detroit and Canada Grand Trunk Junction Railroad Company.

"4. Whether the Secretary of War has authority, under the provisions of the act of February 8, 1859, or in exercise of his discretion as Secretary of War, to authorize the said street-railway company to use any part of the lands conveyed to the Chicago, Detroit and Canada Grand Trunk Junction Railroad Company."

On reference to the act of February 8, 1859, it will be observed that the statute itself expressly grants the "right of way through" and the "privilege of constructing depots and workshops on" the military reservation, to any railroad company, &c., if in the opinion of the President such grant be not injurious to the public defense; with this further condition, that the location of the buildings and position and width of the road be first determined by the Secretary of War and ap-

Fort Gratiot Military Reservation.

proved by the President. The grant takes effect upon no specific part of the reservation until the location of the buildings and the position and width of the road have been thus determined and approved, and after this it operates upon such part, and such part only, as has been so definitely assigned for the purposes of the buildings and the road. But it passes nothing more than an easement, a right to use the land for the purposes mentioned; the ownership of the soil remaining in the United States, and the latter consequently still retaining all the right of a proprietor over the same not inconsistent with the interest granted.

Clearly it was not competent for the Secretary of War to enlarge the grant contained in the statute; or, indeed, (as it would seem from the fact that no power is given him for the purpose, coupled with the fact that words of direct grant are found in the statute,) to make any grant whatever. What he was authorized to do was, to determine the location of the buildings on, and the position and width of the road through the reservation, and the price of the land to be so occupied. This being done, and approved by the President, the law itself operated a grant. Yet the instrument executed by the Secretary of War, though it may not be efficient as a grant, is to be taken as manifesting his determination in regard to the location of the buildings, and the position and width of the road, together with the price of the land; and, since it bears the approval of the President, it appears to sufficiently satisfy the requirements of the law on those subjects to make the statutory grant effective. It locates and ascertains the limits of so much of the reservation as was deemed necessary by the Secretary for the buildings and road of the above-named company; and I entertain no doubt that the company have acquired, by force of the statute, a valid right to the use of the land within those limits for the purposes aforesaid. This right, like any other easement derivable by grant in the soil of another, is necessarily exclusive; that is to say, no one but the grantee of the right is entitled to share or enjoy it.

The conclusions thus arrived at respecting the grant to the Chicago, Detroit and Canada Grand Trunk Junction Railroad Company sufficiently indicate my answer to the first

Fort Gratiot Military Reservation.

and second questions above enumerated. As to the remaining questions, I will briefly remark that the act of January 31, 1866, as already stated, authorized the Secretary of War to grant the use of so much of the reservation as was necessary to extend a horse-railroad from Port Huron City to the depot of the Port Huron and Detroit Railroad. By virtue of this authority, the Secretary, on the 6th of August, 1866, granted to the street-railway company the use of a strip of land for its road within the reservation. This grant did not interfere with the previous one to the Chicago, Detroit and Canada Grand Trunk Junction Railroad Company, and it is not denied that the street-railway company acquired a right commensurate with the grant thereto. But no other grant has been made to that company, and consequently such right as it now has in the reservation is limited to the strip of land referred to. It necessarily follows that the street-railway company has no right, under the act of 1866, to use any part of the lands covered by the grant to the Chicago, Detroit and Canada Grand Trunk Junction Railroad Company. Nor does it seem to me that the Secretary of War has any authority under the act of February 8, 1859, or in the exercise of his discretion as Secretary of War, to confer upon the former company the privilege of using any part of those lands.

I gather from the papers submitted to me that the Chicago, Detroit and Canada Grand Trunk Junction Railroad Company contemplate laying several additional tracks on the lands mentioned. In regard to this, I deem it proper to direct your attention to the precise terms of the grant to that company, which are (*inter alia*) that the "position" of the road be first determined by the Secretary of War, and approved by the President. This is applicable not only to the main track of the road, but to the side tracks and branches thereof. Before either of these can be placed on the reservation, its *position* must, by the express provisions of the statute, be first determined and approved as aforesaid; and the military authorities in charge of the reservation may lawfully interfere, if circumstances should render their interference necessary, to prevent the laying of such tracks or

Fees and Costs in Prosecutions against Seamen.

branches until the requirements of the statute have been complied with.

The papers which accompanied your communication are herewith returned.

I am, sir, very respectfully, your obedient servant,
GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,
Secretary of War.

FEEES AND COSTS IN PROSECUTIONS AGAINST SEAMEN.

The fees and costs allowable in prosecutions against seamen, charged with any of the offenses enumerated in the act of June 7, 1872, chap. 322, are regulated by the act of February 26, 1853, chap. 80.

Whether the provisions of the act of 1872, respecting the punishment of the offenses referred to, apply to seamen engaged for service on foreign vessels as well as to those engaged for service on American vessels, is a question that appropriately belongs to the courts having cognizance of such offenses to determine, and their determination should govern the action of the executive department of the Government in regard to the allowance of fees and cos's, so far as such action depends on the answer to that question.

DEPARTMENT OF JUSTICE,
November 5, 1873.

SIR: Your communication of the 11th instant informs me that an account has been rendered to the Treasury Department by the United States attorney for the district of Oregon, in which compensation is claimed for services in a criminal proceeding against a seaman who was indicted under the act of June 7, 1872, (17 Stat., 275,) for refusing in an American port to join a foreign ship on which he had been lawfully engaged; that fees are also charged for services in prosecutions under the same act against lawfully-engaged seamen for refusing to join ships sailing under the American flag; that in the accounts of officers of United States courts in other districts similar cases are beginning to appear; and that the accounting-officers of the Treasury are in doubt in regard to the allowance of such fees. In connection with these facts, you therein request my opinion upon the following question: "Whether any, and if any what, costs accruing under the

Fees and Costs in Prosecutions against Seamen.

provisions of said act concerning the discipline of seamen are chargeable to the United States, and payable from the judiciary fund; and whether seamen of foreign vessels are included in said provisions, so as to make the United States liable for the expense of their arrest and prosecution."

Where prosecutions in the United States courts, district or circuit, against seamen charged with any of the offenses enumerated in the aforesaid act of June 7, 1872, are entertained by those courts, it is done, I presume, by virtue of the general jurisdiction conferred upon them over crimes and offenses cognizable under the authority of the United States, (see sections 9, 10, 11, of the act of September 24, 1789, 1 Stat., 76, 78; and section 3 of the act of August 23, 1842, 5 Stat., 8, 17;) and I do not doubt that it is within the competency of the courts named to entertain such proceedings. Accordingly, the fees and costs allowable in these prosecutions, as in case of other similar prosecutions in the same court, would seem to be regulated by the act of February 26, 1853, (10 Stat., 165.) Permit me, then, in answer to the first branch of your question, to refer you to this act, the provisions of which are familiar and need not be particularly mentioned here.

As to the second or last branch of your question, the provisions of the act of 1872 relating to "discipline of seamen" are nearly identical in language with, and appear to have been copied from, the provisions of the British merchant shipping-act of 1854 relating to the same subject. In a case arising under the latter act, its provisions concerning that subject were held by the court of Queen's Bench to have reference to British ships alone, (see *Leary vs. Lloyd*, 3 E. & E., 178,) and I am inclined to the view that the provisions of the act of 1872, adverted to above, were intended by Congress to apply only to seamen lawfully engaged for service on American vessels. (See *Ex parte D'Olivera*, 1 Gallison, 473, as to construction of act of 1790, 1 Stat., 131.) But whether these provisions are or are not thus restricted in their application; in other words, whether, as regards the punishment of offenses enumerated therein, they are applicable to seamen engaged for service on foreign vessels as well as to those engaged for service on American vessels, is a matter that appropriately belongs to the courts having cognizance of such offenses to determine,

Alaska.

and their determination should govern the action of the executive department of the Government. It is to be presumed that where a prosecution against a seaman of the former description has been instituted under the act of 1872, and the court has entertained jurisdiction, the statute is deemed by the court to be applicable to such case; and an allowance of the fees and costs of the proceeding cannot, I think, properly be refused by the Department, on the ground of any doubt it may have as to the correctness of the view of the law acted upon by the court.

I have the honor to be, very respectfully,

GEO. H. WILLIAMS.

Hon. WM. A. RICHARDSON,

Secretary of the Treasury.

ALASKA.

By the act of March 3, 1873, chap. 227, the introduction of spirituous liquors or wine into the Territory of Alaska, unless authorized by the War Department, is absolutely prohibited.

DEPARTMENT OF JUSTICE,

November 13, 1873.

SIR: I have the honor to acknowledge the receipt of your letter of the 10th instant, submitting for my official opinion the question as to whether or not the Territory of Alaska is embraced within the term "Indian country," and also whether or not your Department has authority to exercise control over the introduction of spirituous liquors into that Territory.

Section 4 of the act of July 27, 1868, (15 Stat., 241,) provides "that the President shall have power to restrict and regulate or to prohibit the importation and use of fire-arms, ammunition, and distilled spirits into and within the said Territory."

Pursuant to the power thus conferred, the President made several proclamations regulating the introduction and use of distilled spirits in Alaska.

The last paragraph of the act of March 3, 1873, (17 Stat., 530,) provides "that the laws of the United States relating to customs, commerce, and navigation, and sections 20 and

Alaska.

21 of the act to regulate trade and intercourse with the Indian tribes and to preserve peace on the frontier, approved June 30, 1834, be, and the same are hereby, extended to and over all the main-lands, islands, and waters of the territory ceded to the United States by the Emperor of Russia, by treaty concluded at Washington on the 30th day of March, A. D. 1867, so far as the same may be applicable thereto."

Section 20 of said act of 1834, as amended by the act of the 13th of February, 1862, (12 Stat., 339,) is as follows :

"SEC. 20. *And be it further enacted*, That if any person shall sell, exchange, give, barter, or dispose of any spirituous liquor or wine to any Indian under the charge of any Indian superintendent or Indian agent appointed by the United States, or shall introduce or attempt to introduce any spirituous liquor or wine into the Indian country, such person, on conviction thereof before the proper district court of the United States, shall be imprisoned for a period not exceeding two years, and shall be fined not more than three hundred dollars: *Provided, however*, That it shall be a sufficient defense to any charge of introducing or attempting to introduce liquor into the Indian country, if it be proved to be done by order of the War Department, or of any officer duly authorized thereto by the War Department. And if any superintendent of Indian affairs, Indian agent, or subagent, or commanding officer of a military post, has reason to suspect or is informed that any white person or Indian is about to introduce, or has introduced, any spirituous liquor or wine into the Indian country in violation of the provisions of this section, it shall be lawful for such superintendent, agent, subagent, or commanding officer, to cause the boats, stores, packages, wagons, sleds, and places of deposit of such person to be searched; and if any such liquor is found therein, the same, together with the boats, teams, wagons, and sleds used in conveying the same, and also the goods, packages, and peltries of such person, shall be seized and delivered to the proper officer, and shall be proceeded against by libel in the proper court, and forfeited, one-half to the informer and the other half to the use of the United States; and if such person be a trader, his license shall be revoked and his bond put in suit. And it shall, moreover, be lawful for any per-

Case of Thomas G. Williams.

son in the service of the United States, or for any Indian, to take and destroy any ardent spirits or wine found in the Indian country, except such as may be introduced therein by the War Department. And in all cases arising under this act Indians shall be competent witnesses."

In so far as this section conflicts with preceding acts of Congress they are repealed. According to the said act of 1868, the President was invested with unlimited discretion over the introduction and use of spirituous liquors in the Territory of Alaska; but Congress, in 1873, adopting the above-cited section 20 of the act of 1834, absolutely prohibits the introduction of spirituous liquors or wine into said Territory unless authorized by the War Department.

My opinion, therefore, is that, as to this matter, Alaska is to be regarded as "Indian country," and that no spirituous liquors or wines can be introduced into that Territory without an order by the War Department for that purpose.

Very respectfully,

GEO. H. WILLIAMS.

HON. WM. W. BELKNAP,
Secretary of War.

CASE OF THOMAS G. WILLIAMS.

Where the payment of a claim against the Government would otherwise come within the prohibition of the joint resolution of March 2, 1867, [No. 46,] the fact that the political disabilities of the claimant, imposed by the third section of the fourteenth amendment of the Constitution, have since been removed by Congress, does not free the claim from the operation of that resolution; the prohibition of payment still continues.

DEPARTMENT OF JUSTICE,

November 15, 1873.

SIR: I have the honor to acknowledge the receipt of your letter of the 30th ultimo, in which you ask for my opinion as to the validity of the claim below mentioned, upon a statement of facts submitted by the Second Comptroller of the Treasury which is in substance as follows:

Thomas G. Williams graduated at the United States Military Academy, and was appointed brevet second lieutenant Sec-

Bankrupt-Law.

ond Infantry July 1, 1849. He was promoted second lieutenant First Infantry June 13, 1850, and first lieutenant August 7, 1855. He resigned March 15, 1861, and joined in the rebellion against the United States. He now claims that a balance of pay, as of his grade in the Army, is due him from October 1, 1852, to November 30, 1852, and from March 1 to the date of his discharge, March 15, 1861.

Congress by joint resolution, approved March 2, 1867, (14 Stat., 571,) declares "that until otherwise ordered it shall be unlawful for any officer of the United States Government to pay any account, claim, or demand against said Government which accrued or existed prior to the thirteenth day of April, A. D. eighteen hundred and sixty-one, in favor of any person who promoted, encouraged, or in any manner sustained the late rebellion," &c.

On the 3d of March, 1873, (17 Stat., 792,) Congress passed an act providing "that all political disabilities imposed by the third section of the fourteenth amendment of the Constitution of the United States be, and the same are hereby, removed from James D. Halyburton, of Virginia, and Thomas G. Williams, of San Antonio, in the State of Texas." Williams, it seems, maintains that this act in some way modifies the joint resolution of 1867, so as to make his said claim valid against the United States.

There is no foundation whatever for this assumption. The disabilities referred to in said act relate exclusively to the right to hold office. Said joint resolution remains in full force and effect, and as the claim in question is one of those described therein it cannot be paid.

Very respectfully,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,
Secretary of War.

BANKRUPT-LAW.

Where a payment is made by a debtor to a creditor who has committed an act of bankruptcy, and against whom proceedings in bankruptcy have been instituted and are pending, but who has not yet been adjudged a bankrupt, it will not be a valid satisfaction of the debt in the event of an adjudication of bankruptcy in such proceedings, if the payment transpired subsequent to the filing of the petition therein.

Bankrupt-Law.

But a payment made by a debtor to a creditor who is known to have committed an act of bankruptcy, but against whom proceedings have not at the time been taken, is valid, so far at least as the present bankrupt-law is concerned.

All debts and liabilities subsisting in favor of the bankrupt at the period when the petition was filed, or then constituting a part of his estate, together with the right to receive or sue for and recover the same, become upon the execution of the assignment completely and exclusively vested in the assignee by relation to that period.

Hence a payment to the bankrupt of any such debt or liability after that date would be no satisfaction of the demand as against the claim of the assignee, *unless the payment is protected by some exception made by Congress which covers the particular case.*

Neither the bankrupt act of 1867, nor its supplements, contain any exception, express or implied, in favor of a debtor who has paid his debt to the bankrupt after the time of filing the petition against the latter.

It follows that the claim of the assignee, duly appointed, must prevail against the debtor, notwithstanding such payment, though it was made *bona fide* and without knowledge of the bankruptcy proceeding.

DEPARTMENT OF JUSTICE,
November 18, 1873.

SIR: I have the honor to acknowledge the receipt of your letter of the 1st instant, in which, at the instance of the First Comptroller, you submit for my official opinion the following questions:

“Whether a valid payment can be made, first, to a person who has committed an act of bankruptcy, and against whom proceedings have been instituted and are pending in bankruptcy, but who has not yet been adjudged a bankrupt; second, to a person who is known to have committed an act of bankruptcy, but against whom proceedings have not yet been taken.”

The 14th section of the bankrupt-law of 1867 (14 Stat., 522) provides for an assignment of all the estate, real and personal, of the bankrupt to the assignee appointed under the provisions of that statute, and declares that such assignment shall *relate back to the commencement of the proceedings in bankruptcy*, and that “thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee,” &c. Certain exemptions from the assignment are expressly made, but they are of no consequence in connection with the questions proposed. In the 3d proviso of the same

Bankrupt-Law.

section it is furthermore declared that, among other things, all choses in action belonging to the bankrupt, and all debts due him, or any person for his use, with the like right, title, power, and authority to dispose of, sue for, and recover the same, as the bankrupt might or could have had if no assignment had been made, "shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee."

This section refers to an assignee appointed under a proceeding in what is called *voluntary bankruptcy*; but its provisions, so far as pertinent here, are made applicable to assignees appointed in cases of *involuntary bankruptcy* by the 42d section, and the expression "commencement of proceedings in bankruptcy," whether voluntary or involuntary, is defined in section 38 to mean the filing of the petition in bankruptcy.

The 35th section of the act declares void (among other transactions) all payments made by any person being insolvent, or in contemplation of insolvency or bankruptcy, within four or six months previous to the filing of the petition, with a view to give fraudulent preference or to evade the provisions of the act, where the party receiving the same has reasonable cause to believe that such person is insolvent or is acting in contemplation of insolvency, &c.; and this and the 39th section authorize the recovery back by the assignee of the money so paid. But there is no provision in the act which invalidates payments made to the bankrupt before the petition is filed against him. In a legal point of view, these payments, therefore, seem to stand precisely as they would if no bankruptcy proceedings were instituted.

In an opinion given by the Supreme Court of the United States in a late case before the same, (*Buchanan vs. Smith*, 16 Wall., 277,) it is remarked with reference to section 14, above cited, that the appointment of an assignee under a decree in bankruptcy relates back to the commencement of the bankrupt proceedings, and that the instrument required to be executed under the hand of the judge or register assigns and conveys to the assignee "all the estate, real or personal, of the bankrupt, including equitable as well as legal rights and interests, and things in action as well as those in possession,

Bankrupt-Law.

which belonged to the debtor at the time the petition in bankruptcy was filed in the district court."

This view of the scope and effect of the assignment mentioned appears to me to rest upon the plain and obvious meaning of the statute; and accepting it as a correct statement of the law as it now stands, the result at which I arrive is, that all debts and liabilities subsisting in favor of the bankrupt at the period when the petition was filed, or then constituting a part of his estate, together with the right to receive or sue for and recover the same, become, upon the execution of the assignment, completely and exclusively vested in the assignee by relation to that period, and that, consequently, a payment to the bankrupt of any such debt or liability after that date would be no satisfaction of the demand as against the claim of the assignee, unless the payment is protected by some exception made by Congress which covers the particular case.

By the bankrupt-act of April 4, 1800, (2 Stat., 19,) an assignment by the commissioners of a bankrupt's estate had a retrospective relation to the time when the act of bankruptcy was committed upon which the commission issued. (See sec. 10.) They were empowered to assign all the debts due to the bankrupt, or to any person for his use, and, after the assignment, neither the bankrupt nor any person acting as trustee for him could legally recover or discharge the same. But it was expressly enacted that where any debtor, *bona fide*, paid his debt to the bankrupt without notice of the bankruptcy, he should not be liable to pay it to the assignee. (See sec. 11.) Here the principle is distinctly recognized by Congress that, *except where it is otherwise provided by statute*, a payment made to the bankrupt subsequent to the time at which the assignment takes effect does not discharge the indebtedness as against the assignee.

Under the bankrupt-act of August 19, 1841, (5 Stat., 440,) the estate of the bankrupt became vested in the assignee only "from the time of" the *decree* of bankruptcy. (See sec. 3.) This act declared void certain payments, &c., when made by the bankrupt previous to the decree, in contemplation of bankruptcy. (See sec. 2.) Yet payments made to the bankrupt before the decree would seem to be unaffected by the

Bankrupt-Law.

act. No provision is contained therein protecting payments made to the bankrupt subsequent to the decree and after the title to his estate had vested in the assignee, but such cases were left subject to the legal effect of the assignment, which, operating as a general transfer of all the estate of the bankrupt at the date of the decree, would seem to invalidate any such payment.

I am unable to discover any exception, express or implied, in the act of 1867, or its supplements, in favor of a debtor who has paid his debt to the bankrupt after the time of *filing the petition* against the latter. This, as already observed, is the period to which the assignment under that act relates, and at which the title to the bankrupt's estate vests in the assignee.

From the absence of such exception in the statute, and upon the principle recognized by Congress as above stated, the conclusion appears to me to be unavoidable that the claim of the assignee, duly appointed, would prevail against the debtor, notwithstanding such payment, though it was made *bona fide* and without knowledge of the bankruptcy proceeding. This doctrine, I find, is supported by an opinion of the supreme court of Pennsylvania, given in 1870. (See *Mays vs. Manufacturers' National Bank*, 64 Penn. St., 74.)

The same principle is applied by the courts of England in construing the bankrupt-laws of that country. There the transfer of the bankrupt's estate, by operation of those acts, relates back to the act of bankruptcy. This relation was originally founded upon the provisions of the earliest of their bankruptcy acts, namely, the 34 and 35 Hen. VIII, chap. 4, § 1, and the 13 Eliz., chap. 7, § 2. In these two statutes there was no exception inserted; all were bound thereby: *bona-fide* purchasers of lands and goods, though for a valuable consideration and without notice, debtors who had paid the amount of the sums due from them, and creditors of the bankrupt to whom the amount of debts owing to them from the bankrupt had been paid, though without notice—all were included, (see *Garland vs. Carlisle*, 4 C. and F., 786.) But the legislature has, from time to time, by new statutes, cut down the relation in particular cases; as, first, in the case of payment of debts to the bankrupt before notice of an act of

Bankrupt-Law.

bankruptcy, (1 Jac. I, chap. 15;) next, in the case of the sale of real property by the bankrupt, where the commission was not sued out within five years after the secret act of bankruptcy, (21 Jac. I, chap. 19;) again, in the case of payments by the bankrupt to creditors for goods sold, (19 Geo. II, chap. 32;) and again, in the case of conveyances, contracts, and other dealings and transactions with bankrupts, *bona fide* made and entered into more than two calendar months before the date and issuing of the commission, (46 Geo. III, chap. 65.) "The very circumstance of these partial restrictions of the general rule of relation to the act of bankruptcy," remarks Lord Chief-Justice Tindal, in the case above cited, "establishes beyond doubt two propositions: first, that no consideration of hardship in the individual case will be sufficient to exempt it from the reach of the statutory relation; and next, that nothing short of the power of the legislature itself is sufficient to relax the severity of the former statutes."

I may also add that under the English bankruptcy law now in force (the 32 and 33 Vict., chap. 71) any payment made in good faith and for value received to any bankrupt before the date of the order of adjudication, by a person not having at the time of such payment notice of any act of bankruptcy committed by the bankrupt and available against him for adjudication, is protected by the statutes.

My opinion, therefore, is, in view of the foregoing considerations, 1st. That a payment made by a debtor to a creditor who has committed an act of bankruptcy, and against whom proceedings in bankruptcy have been instituted and are pending, but who has not yet been adjudged a bankrupt, will not be valid in the event of an adjudication of bankruptcy in such proceedings if the payment transpired subsequent to the filing of the petition therein; 2d. That a payment made by a debtor to a creditor who is known to have committed an act of bankruptcy, but against whom proceedings have not at the time been taken, is valid, so far at least as the existing bankrupt-laws are concerned.

I am, sir, very respectfully, your obedient servant,
GEO. H. WILLIAMS.

Hon. WM. A. RICHARDSON,
Secretary of the Treasury.

Distribution of the Proceeds of Forfeitures, etc.

DISTRIBUTION OF THE PROCEEDS OF FORFEITURES, ETC.

From January 31, 1873, to April 1, 1873, a vacancy existed in the office of surveyor of the port of New York, during which period B., a deputy surveyor of the same port, performed the duties of the office of surveyor. B. claims so much of the proceeds of fines, penalties, and forfeitures incurred under the customs-laws within that period as would have been distributable to the surveyor had there been no vacancy in the office. *Held* that the claimant does not come within the description of persons to whom distribution of such proceeds is, by the statute, (the 1st section of the act of March 2, 1867, chap. 183,) authorized to be made, and that the claim has, therefore, no validity.

If that portion of the proceeds mentioned, for which claim is made by B., remains undistributed, it should be divided equally between the collector and naval officer appointed for the port or district of New York during the period above stated.

DEPARTMENT OF JUSTICE,

November 28, 1873.

SIR: I have considered the question submitted by you to me in your letter of the 27th ultimo, "as to the disposition to be made of the distributive share of the proceeds of fines, penalties, and forfeitures which would have been distributed to the surveyor of the port of New York during the space intervening between the time at which Mr. Cornell's resignation took effect and the time of his successor's entry upon office."

The period here referred to is, as I understand, from the 31st of January, 1873, to the 1st of April, 1873, during which a vacancy appears to have existed in the office of the surveyor of that port.

Claim is made by Mr. James L. Benedict, who was a deputy surveyor at the same port during the same period, for so much of the proceeds of fines, penalties, and forfeitures incurred under the customs-laws, between the dates above mentioned, as would have been distributable to the surveyor had there been no vacancy in the office. This claim is based upon the alleged facts that during that time Mr. Benedict "performed the duties and exercised the authorities of surveyor of the port of New York, and was so recognized, not only by the collector and naval officer, but by the Treasury Department."

Distribution of the Proceeds of Forfeitures, etc.

By the 1st section of the act of March 2, 1867, (14 Stat., 546,) it is provided that, after making certain deductions from the proceeds of fines, penalties, and forfeitures incurred under the customs-laws, the residue thereof shall be distributed as follows: "One-half to the United States; one-fourth to the person giving the information which has led to the seizure or to the recovery of the fines or penalty, and if there be no informer other than the collector, naval officer, or surveyor, then to the officer making the seizure; and the remaining one-fourth to be equally divided between the collector, naval officer, and surveyor, or such of them as are appointed for the district in which the seizure has been made, or the fine or penalty incurred, or if there be only a collector, then to such collector," &c.

The right to a distributive share of such proceeds depends entirely upon the above provision—upon whether the claimant comes within the description of persons to whom distribution is thereby authorized to be made. Now, the claim of Mr. Benedict rests on the ground, not that he was ever appointed surveyor, but that he performed the duties of the office of surveyor. This, I think, does not bring him within the description contained in the statute. The scheme of distribution there expressly names the *surveyor appointed for the district* among those entitled to participate in the proceeds; but one who is provisionally discharging the duties of the office of surveyor *during a vacancy* therein does not, in my opinion, answer that description, nor, indeed, any other mentioned in said scheme. From this point of view, the conclusion is unavoidable that the claim referred to has no validity.

The inquiry now arises, How should the proceeds to which that claim relates be disposed of? It will be found, upon examining the statute, that, after awarding one-half of the distributable proceeds to the Government and one-fourth to the informer or seizing officer, it provides that the remaining one-fourth shall be "equally divided between the collector, naval officer, and surveyor, or *such of them as are appointed for the district in which the seizure has been made,*" &c., and the question under consideration concerns the "remaining one-fourth." There would seem to be little ground for controversy as to the meaning of the provision just quoted. The

Police Board of the District of Columbia.

first branch of it assumes the existence of a collector, naval officer, and surveyor, and makes an equal distribution of the one-fourth between them. But the second branch of it makes a similar division between "such of them as are appointed for the district," and is by its terms applicable to and was probably designed for the case where only two of those officers have been thus appointed. So that, under the latter branch of the provision, if only two of the officers named happened to be appointed for any district, an equal division of the entire one-fourth is required to be made between the two.

I see nothing in the law to warrant the conclusion that the words "or such of them as are appointed" in said act apply only to those districts where less than three of said offices are established; on the contrary, the idea of an appointment to an office generally presupposes the existence of such office. The plain and natural meaning of the statute seems to me to be, that where there is a collector, naval officer, and surveyor, holding their respective offices by regular appointment, the one-fourth is to be equally divided between them; but if there be only two of them holding by regular appointment, then the said one-fourth is to be equally divided between them; and if there be no other than the collector, then the whole goes to him. Assuming, then, that the proceeds claimed by Mr. Benedict, and to which the question submitted by you refers, remain undistributed, I am of the opinion that they should be divided equally between the collector and naval officer appointed for the port or district of New York during the period above stated.

I am, sir, very respectfully, your obedient servant,
GEO. H. WILLIAMS.

Hon. WM. A. RICHARDSON
Secretary of the Treasury.

POLICE BOARD OF THE DISTRICT OF COLUMBIA.

By the 3d section of the act of July 23, 1866, chap. 215, which remains in full force, no valid license for the sale or disposal of intoxicating drinks within the District of Columbia can be issued without the approval of the Board of Metropolitan Police.

Police Board of the District of Columbia.

The board is bound to act on all licenses duly presented for approval; but it is not required to *approve* every license so presented, though as regards such license a full compliance with the other provisions of the license-laws is shown.

The power conferred upon the board is wholly discretionary, and may be exercised by it as the circumstances of each case in its judgment seem to require.

DEPARTMENT OF JUSTICE,
December 10, 1873.

SIR: I have received your letter of the 8th ultimo, in which, after referring to the 3d section of the act of July 23, 1866, amendatory of the acts establishing a metropolitan police in the District of Columbia, (14 Stat., 213,) you request my opinion as to the nature and extent of the power or authority thereby conferred upon the board of police in regard to licenses for the sale of intoxicating drinks within the District. This request, you inform me, is made under instructions from the board.

It is not the practice of the Attorney-General to give official opinions except at the request of the President or the head of one of the Departments. But as by virtue of the act of March 3, 1873, (17 Stat., 517,) a direct official relation now exists between the Department of Justice and the metropolitan police, it seems to me to be proper that the Attorney-General should advise the latter respecting the performance of their duties when requested so to do.

By the above-mentioned section it was made unlawful, from and after the expiration of licenses then already granted, for any person or persons, keeping an ordinary restaurant, saloon, or other place where spirituous liquors are sold, within the District of Columbia, to give, sell, or dispose of any intoxicating drinks without a license approved by the board of police, and it was also provided that thereafter no such license should be considered legal by any of the authorities having jurisdiction within the District until the same should have been approved by the board of police and so certified by the secretary thereof under the office seal.

That enactment appears to remain in full force at the present time, and under its provisions it is very clear that no valid license of the above description can be issued without the approval of the board. Whether in any case a license shall be

The Virginius.

approved by the board or not is left entirely to its judgment. The board is bound to act on all licenses duly presented for approval; but it is not required to act in a particular way. It is not required to *approve* every license so presented, though as regards such license a full compliance with the other provisions of the license-laws is shown.

The power conferred upon the board is wholly discretionary, and may be exercised as the circumstances of each case in its judgment may require.

Very respectfully,

GEO. H. WILLIAMS.

HON. WILLIAM J. MURTAGH,

President of the Board of Metropolitan Police,

Washington City.

THE VIRGINIUS.

Under the provisions of the 1st and 4th sections of the act of December 31, 1792, chap. 1, no vessel in which a foreigner is directly or indirectly interested can lawfully be registered as a vessel of the United States; nor can it be deemed a vessel of the United States or entitled to the benefits or privileges appertaining to a vessel of that description.

So where a vessel has been registered, but the registry was obtained by a false oath as to its ownership, the vessel being at the time owned in whole or in part by foreigners, it cannot be deemed a vessel of the United States.

Seem that the Virginius, though registered as an American vessel, was in fact owned by foreigners, and that the registry thereof was fraudulently obtained; and hence, at the time of her capture by the Spanish man-of-war Tornado, she had no right, by virtue of that registry, as against the United States, to carry the American flag.

Yet, while upon the high seas, actually bearing an American register and carrying an American flag, she was as much exempt from interference by another power as though she had been lawfully registered; the question whether or not her register was fraudulently obtained, or whether or not she was sailing in violation of any law of the United States, being one over which such power could not then and there rightfully exercise jurisdiction.

DEPARTMENT OF JUSTICE,

December 17, 1873.

SIR: I have the honor to acknowledge the receipt of your letter of the 11th instant, submitting to me a large number of documents and depositions, and asking for my opinion as to whether or not the Virginius, at the time of her capture

The *Virginus*.

by the Spanish man-of-war *Tornado*, was entitled to carry the flag of the United States, and whether or not she was carrying it improperly and without right at that time.

This question arises under the protocol of the 29th ultimo between the Spanish minister and the Secretary of State, in which, among other things, it is agreed that on the 25th instant Spain shall salute the flag of the United States. But it is further provided that "if Spain should prove to the satisfaction of the Government of the United States that the *Virginus* was not entitled to carry the flag of the United States, and was carrying it, at the time of her capture, without right and improperly, the salute will be spontaneously dispensed with, as in such case not being necessarily requirable; but the United States will expect, in such case a disclaimer of the intent of indignity to its flag in the act which was committed."

Section 1 of the act of December 31, 1792, provides that ships or vessels registered pursuant to such act, "and no other, (except such as shall be duly qualified, according to law, for carrying on the coasting trade and fisheries, or one them,) shall be denominated and deemed ships or vessels of the United States, entitled to the benefits and privileges appertaining to such ships." Section 4 of the same act provides for an oath, by which, among other things, to obtain the registry of a vessel, the owner is required to swear "that there is no subject or citizen of any foreign prince or state directly or indirectly, by way of trust, confidence, or otherwise, interested in such ship or vessel, or in the profits or issues thereof."

Obviously, therefore, no vessel in which a foreigner is directly or indirectly interested is entitled to a United States registry, and if one is obtained by a false oath as to that point, and the fact is that the vessel is owned or partly owned by foreigners, she cannot be deemed a vessel of the United States, or entitled to the benefits or privileges appertaining to such vessels.

The *Virginus* was registered in New York on the 26th of September, 1870, in the name of Patterson, who made oath as required by law; but the depositions submitted abundantly show that, in fact, Patterson was not the owner at that time, but that the vessel was the property of certain Cuban citi-

The Virginius.

zens in New York who furnished the necessary funds for her purchase. I. E. Shepherd, who commanded said vessel when she left New York, with a certificate of her register in the name of Patterson, testifies positively that he entered into an agreement to command said vessel at an interview between Quesada, Mora, Patterson, and others, at which it was distinctly understood that the *Virginus* belonged to Quesada, Mora, and other Cubans, and that said Mora exhibited to him receipts for the purchase-money, and for the repairs and supplies upon said steamer, and explained to him how said funds were raised among the Cubans in New York. Adolpho De Varona, who was the secretary of the Cuban Mission in New York at the time the *Virginus* was purchased, and afterwards sailed in her as Quesada's chief of staff, testifies that he was acquainted with all of the details of the transaction, and knows that the *Virginus* was purchased with the funds of the Cubans and with the understanding and arrangement that Patterson should appear as the nominal owner because foreigners could not obtain a United States register for the vessel. Francis Bowen, Charles Smith, Edward Greenwood, John McCann, Matthew Murphy, Ambrose Rawlings, Thomas Gallagher, John Furlong, Thomas Anderson, and George W. Miller, who were employed upon the *Virginus* in various capacities after she was registered in the name of Patterson, testify clearly to the effect that they were informed and understood while they were upon the vessel that she belonged to Quesada and the Cubans represented by him, and that he navigated, controlled, and treated such vessel in all respects as though it was his property.

Nothing appears to weaken the force of this testimony, though the witnesses were generally subjected to cross-examination; but, on the contrary, all the circumstances of the case tend to its corroboration.

With the oath of registry, the statute requires a bond to be given, signed by the owner, captain, and one or more sureties, but there were no sureties upon the bond given by Patterson and Shepherd. Pains have been taken to ascertain if there was any insurance upon the vessel, but nothing of the kind has been found; and Quesada, Varona, and the other Cubans who took passage upon the *Virginus*, instead of

The Virginus.

going on board at the wharf in the usual way, went aboard off a tug after the vessel had left the harbor of New York.

I cannot do otherwise than to hold, upon this evidence, that Patterson's oath was false, and that the register obtained in his name was a fraud upon the navigation-laws of the United States.

Assuming the question to be, what appears to conform to the intent of the protocol, whether or not the *Virginus*, at the time of her capture, had a right, as against the United States, to carry the American flag, I am of the opinion that she had no such right, because she had not been registered according to law; but I am also of the opinion that she was as much exempt from interference on the high seas by another power, on that ground, as though she had been lawfully registered. Spain no doubt has a right to capture a vessel with an American register and carrying an American flag, found in her own waters, assisting or endeavoring to assist the insurrection in Cuba, but she has no right to capture such a vessel on the high seas upon an apprehension that, in violation of the neutrality or navigation laws of the United States, she was on her way to assist said rebellion. Spain may defend her territory and people from the hostile attack of what is, or appears to be, an American vessel, but she has no jurisdiction whatever over the question as to whether or not such vessel is on the high seas in violation of any law of the United States. Spain cannot rightfully raise that question as to the *Virginus*, but the United States may, and, as I understand the protocol, they have agreed to do it; and governed by that agreement, and without admitting that Spain would otherwise have any interest in the question, I decide that the *Virginus* at the time of her capture was without right and improperly carrying the American flag.

Very respectfully,

GEO. H. WILLIAMS.

HON. HAMILTON FISH,
Secretary of State.

Case of Lieutenant-Colonel B. S. Roberts.

CASE OF LIEUTENANT-COLONEL B. S. ROBERTS.

After a review of the history of this case, which is founded upon the alleged invalidity of an appointment in the Army made above twenty-seven years ago: *Advised* that the case ought to be considered as finally determined by the decisions of the executive department of the Government heretofore given, and the action of the Senate heretofore had, affirming, directly or indirectly, the validity of that appointment, and should accordingly be regarded as *res adjudicata*.

DEPARTMENT OF JUSTICE,
December 18, 1873.

SIR: I have carefully examined the papers in the case of Lieutenant-Colonel B. S. Roberts, a retired officer of the Army, which I had the honor to receive from you some months ago, together with a number of other papers relating to the same matter subsequently referred to me by the Secretary of War.

This case is founded upon the alleged invalidity of the appointment of Charles F. Ruff, who is also on the retired-list of the Army with the rank of lieutenant-colonel, to a captaincy in the Regiment of Mounted Riflemen raised under the act of May 19, 1846, (9 Stat., 13.) That appointment took place in the year 1846, and, as I gather from the papers, it was made under the following circumstances:

Soon after the passage of the above act, steps were taken to organize the said regiment. The President sent to the Senate nominations for all the officers thereof. These nominations were confirmed by that body on the 27th of May, 1846, and among them was that of Bela M. Hughes, of Missouri, for the office of captain.

On the 1st of June, 1846, a letter of appointment, (a document which I understand it is the practice of the War Department to issue for the information of the person interested, after he has been nominated and confirmed and before he is commissioned by the President,) dated May 29, and signed by the Secretary of War, was forwarded to Hughes, in Missouri, who was directed to report by letter to the major of the regiment, (George S. Burbridge,) at Newport, Kentucky, for instructions.

On the 4th of June, 1846, an order was issued from the

Case of Lieutenant-Colonel B. S. Roberts.

Adjutant-General's Office assigning the captains and subalterns of the regiment to companies, and directing them to report without delay to Major Burbridge, for instructions, at Newport. In this order Hughes was assigned to a company as captain.

But on the 5th of June, Hughes, having then no knowledge of his nomination and confirmation, wrote a letter to the President from Plattsburgh, Missouri, withdrawing his application for an appointment in the said regiment. It seems that subsequently, on the 23d of June, a letter was written by James M. Hughes to the Adjutant-General from Liberty, Missouri, acknowledging the receipt of the letter of appointment sent to Bela M. Hughes, and informing the Adjutant-General that the appointment would be accepted. This communication, however, was not received by the Adjutant-General until the 8th of July following, and in the mean time the President, acting on Hughes's letter of 5th of June, and treating it as a declination of office, had nominated Ruff, who was not then connected with the Regular Army, to be a captain in the regiment, "in the place of Bela M. Hughes, *declined*." This nomination was confirmed by the Senate on the 7th of July, 1846, and a commission was thereupon issued to Ruff, to date from that period.

At this point it is proper to add, that upon the records of the War Department there appears what purports to be a copy of a commission to Hughes as captain in the Regiment of Mounted Riflemen, dated the 26th of June, 1846, and signed by the Secretary of War and also by the President. But on the margin thereof are the following entries: "*Note*.—This commission was made out and sent over to the President for signature, but was not returned with the others, it being understood that Mr. Hughes had *declined* the appointment." "*Declined*.—See his letter of June 5, 1846."

The above statement comprises all the facts and circumstances disclosed by the papers, which existed previous to Ruff's appointment. What now follows, as will be observed, transpired afterward; and though for that reason the facts set forth can have no bearing whatever upon the question of the validity of that appointment, yet it is thought proper to give them a place here simply as a part of the history of the case.

Case of Lieutenant-Colonel B. S. Roberts.

On the 8th of July, 1846, Hughes wrote to the Adjutant-General, from Forest Retreat, Kentucky, stating that while on his way there he received information of his appointment; that he accepted the same, and would repair without delay to Newport. To this the Adjutant-General replied by letter on the 14th of July, informing Hughes that the President, acting upon his previous letter of June 5, had appointed Ruff a captain in his stead, and that he, Hughes, is not an officer of the Mounted Rifle-men.

On the 13th of July, Hughes wrote to the Adjutant-General from Cincinnati, stating that in the absence of Major Burbridge from Newport he reported himself to his adjutant, and that with the approval of the former his station as recruiting-officer will be at Liberty, Missouri. And it appears that on the 11th of July an order was issued from the headquarters of the regiment at Newport, directing "Captain B. M. Hughes to proceed to Liberty without delay, and there establish a recruiting rendezvous for his company." This order, however, seems to have been issued in ignorance of the appointment of Ruff, which was not officially announced to the Army until the 17th of July, when, by general orders from the War Department of that date, the appointments of the officers of the regiment, with the dates of their respective commissions, were published, and among these appointments was that of "Charles Ruff, of Missouri, July 7, 1846, in place of Bela M. Hughes, *declined*."

On the 14th of July, Hughes again wrote to the Adjutant-General, stating that he had just learned that another was substituted in his place, and declining to yield his appointment. To this the Adjutant-General replied on the 24th of July, repeating the substance of his letter to Hughes of the 14th of July, above mentioned.

Finally, on the 18th of July, Hughes wrote a letter to the Adjutant-General from Saint Louis, in which he formally declined the commission offered him unless the Department desired him to accept it; and it does not appear that he thenceforth made any further pretensions to the office. On the 9th of August following, he wrote from Weston to the Adjutant-General, acknowledging the communication of the latter dated the 24th of July, and making this statement:

Case of Lieutenant-Colonel B. S. Roberts.

"In justice to myself, I must give this explanation: My letter of withdrawal of my application was written under circumstances which were changed after my appointment. This letter I had thought must have reached the President *before* my nomination was made. Seeing my appointment in the 'Union,' and urged by friends, I concluded to accept, and did so July 8th in a letter to you. On the 18th of July, annoyed and harassed by inquiries, and by officious newspaper interference, uncalled for as it was, and in deep chagrin and despair, I wrote you from Saint Louis that, to disembarass the Department, I would decline in favor of my friend Ruff."

The foregoing presents all the information contained in the papers respecting the relations of Hughes to the service, both before and after the appointment of Ruff, as well as all the information they contain touching that appointment during the corresponding period.

Ruff, having accepted his appointment, entered upon duty as an officer of the Regiment of Mounted Riflemen, standing at the foot of the list of captains. At this time Roberts was an officer in the same regiment, and stood at the head of the list of first lieutenants. On the 16th of February, 1847, the latter was promoted to a captaincy, taking rank next below Ruff.

From the date of Ruff's appointment in 1846 down to the year 1853, its validity, so far as the papers show, was not controverted by any one. But on the 12th of May, 1853, Roberts addressed a letter to the Adjutant-General asserting that that appointment was made in violation of the law of the service, the vacancy it was designed to fill not being, as he contended, an original vacancy. "The fact," said he in this letter, "that Captain Ruff was not commissioned to date from the *original* organization of the regiment is conclusive that it was not considered *original*. He filled a vacancy *created* by the non-acceptance of Capt. Bela M. Hughes." Roberts claimed that, at the time this vacancy occurred, he himself, being then the senior first lieutenant in the regiment, was entitled, under the law of the service, to an appointment thereto by promotion; and he asked that his commission as captain, which was dated February 16, 1847, be

Case of Lieutenant-Colonel B. S. Roberts.

canceled and a new one given him, to date from July 7, 1846, the date of Ruff's commission.

By the regulations of the Army, as they existed in 1846, original vacancies were supplied by selection; accidental vacancies to the rank of colonel by promotion, according to seniority, *except in extraordinary cases*; and promotions to the rank of captain were made regimentally. These regulations, by virtue of the 9th section of the act of April 24, 1816, (3 Stat., 298,) had a legislative recognition, subject to any alterations the Secretary of War might adopt, with the approbation of the President. They constituted the law of the service, at the period referred to, concerning appointments in the Army, so far as relates to company and regimental officers.

The case of Roberts, as set forth in his letter to the Adjutant-General, was submitted by the latter to the Secretary of War, with a brief report thereon; and on the 26th of May, 1853, the Secretary decided, in substance, that the vacancy to which Ruff was appointed was not a vacancy occurring as a casualty of the service, but was an original one and subject to be filled as such. Thus the validity of Ruff's appointment was affirmed by the War Department.

Early in 1856 Roberts again brought the case before the Department upon the ground of newly-discovered facts. This time it was presented in the form of a question of rank between him and Ruff, and he asked that the matter be submitted to a board of Army officers; but the application was not granted.

He also laid his case before the Military Committee of the Senate, asking that committee, in the event that Ruff should be nominated to "the vacancy of a majority likely to occur in the rifle regiment," to investigate this question of rank before acting on the nomination. The office of major of the regiment subsequently became vacant, and in December, 1856, Ruff was nominated to the place, being next in line of promotion according to date of commission. While this nomination was pending in the Senate, the chairman of the Committee on Military Affairs transmitted to the Secretary of War the papers in the case of Roberts previously laid before the committee by the latter, with a request that the Secre-

Case of Lieutenant-Colonel B. S. Roberts.

tary return the same after reading them. A few days afterward the Secretary returned the papers, accompanied by an abstract of the previous correspondence in relation to the case taken from the files of the Adjutant-General's Office, together with copies of the letter of Hughes of June 8, July 8, and July 18, and also a communication in which the Secretary maintains the legality of Ruff's appointment. The Senate subsequently confirmed the nomination. Here, then, by this promotion of Ruff, based as it was upon the commission of captain given him in 1846, the validity of his appointment to that office was in effect affirmed by both the Executive and the Senate under circumstances that impart to their decision great weight.

Yet, notwithstanding this action of the Senate and of the Executive, Roberts made application to the Secretary of War in 1858 for a submission of his case to the Attorney-General. It now assumed the form of a claim to "the rank of captain in the Regiment of Mounted Riflemen, from the 7th of July, 1846, and that of major in the same regiment from the 31st December, 1856," these dates being the dates respectively of Ruff's commission as captain and of his commission as major. The case was submitted to the Attorney-General, (Hon. J. S. Black,) who gave an official opinion thereon, under date of March 17, 1859, affirming the validity of the appointment of Ruff in 1846, and pronouncing the claim of Roberts not maintainable. (See 9 Opin., 297.)

Shortly after that opinion was rendered, another effort was made by Roberts to obtain a reference of his case to a board of Army officers by the Secretary of War. But the Secretary, on the 22d of June, 1859, declared that the claim was erroneous, and that the appointment of a board to report upon it was unnecessary and inexpedient.

It does not appear that any further contest was made by Roberts, as regards the validity of Ruff's appointment in 1846, from the year 1859 down to the time when his recent application to the President for a submission of his case to this Department was filed—a period of about thirteen years. During this period the following events happened, affecting the *status* of both those officers relative to the military serv-

Case of Lieutenant-Colonel B. S. Roberts.

ice. On the 10th of June, 1861, Ruff was promoted to the rank of lieutenant-colonel, and on the 30th of March, 1864, he was retired with that rank; while Roberts, on the 13th of May, 1861, was promoted to the rank of major, and on the 28th of July, 1866, to the rank of lieutenant-colonel, and was retired with the latter rank December 15, 1870.

The foregoing review of the previous action on this case exhibits, in brief, the following results:

1. That the validity of Ruff's appointment in 1846, after having been contested by Roberts, was affirmed by the War Department in 1853.

2. That the validity of the same appointment, after having been again strenuously contested by Roberts before the War Department and the Military Committee of the Senate, was affirmed by the Executive and the Senate by promoting Ruff, on that appointment, in 1856-'57.

3. That the validity of the same appointment, after having been again contested by Roberts in 1858-'59, was affirmed by the Attorney-General, and also once more by the War Department.

4. That for thirteen years, subsequent to the decision last mentioned, it was apparently acquiesced in by the contestant, during which period both he and the officer, the validity of whose appointment was contested, were promoted, each to a lieutenant-colonelcy, and retired from service on that rank.

The form in which the case is now presented by Roberts is that of a request, based upon what he regards as a legal right to be nominated by the President to the Senate in such way as to accomplish the following ends: 1st, that his commission as captain of the Regiment of Mounted Riflemen may date from July 7, 1846, vice B. M. Hughes, resigned; 2d, that his commission as major of the Third Cavalry (formerly the Rifle Regiment) may date from December 30, 1856; 3d, that his commission as lieutenant-colonel of the Third Cavalry may date from June 10, 1861—these three dates being the dates of Ruff's commissions, respectively; and, 4th, that he may be appointed a colonel of the Seventh Cavalry, to date from May 6, 1869, this being the date of the commission of Colonel Sturgis, who was promoted after Ruff had been retired.

Case of Lieutenant-Colonel B. S. Roberts.

A number of questions directly arise upon the subject of this request, which touch the authority of the President in respect to the nominations asked, but which, as also the question of the validity of Ruff's appointment, I deem it unnecessary to consider, in view of the opinion hereinafter expressed.

It seems to me that this case of Roberts, standing as it does upon no other foundation than the alleged invalidity of an appointment in the Army made above twenty-seven years ago, ought to be regarded as settled by the decisions of the executive department of the Government heretofore made, and the action of the Senate heretofore had, affirming directly or indirectly the validity of that appointment.

Moreover, there are no facts now brought forward by Roberts which were not before Attorney-General Black when he rendered his opinion in 1859, cited above, except the fact hereinbefore mentioned, namely, that there appears upon the records of the War Department what purports to be a copy of a commission to Hughes, dated the 26th of June, 1846, and signed by the Secretary of War and also by the President. Yet this must be taken in connection with the entries on the margin thereof, which are equally a part of the same record, and which show that the commission was indeed made out at the War Department and sent over to the President for signature, but was not returned with the other commissions made out at the same time, it being understood that Hughes had declined the appointment, and that this understanding was based on his letter of June 5, 1846. Thus, though the records of the War Department indicate that a commission for Hughes had been prepared, they also indicate that the same had been withheld by the President, and that Hughes was never actually commissioned. So that, had the information furnished thereby even been in the possession of Attorney-General Black at the period referred to, it is not probable that a different conclusion would have been reached by him; since that information obviously does not introduce into the case any new and material ingredient. Under these circumstances the question of the validity of the appointment above alluded to, which was directly passed upon by Attorney-General Black, could not with propriety be re-opened here.

I think, then, that the former decisions and action upon

Purchase at Sale under the Direct-Tax Law.

the case, to which I have already referred, ought to be considered a final determination thereof, and conclusive upon the executive department of the Government.

The papers mentioned are herewith transmitted.

I have the honor to be, with great respect, your obedient servant,

GEO. H. WILLIAMS.

The PRESIDENT.

PURCHASE AT SALE UNDER THE DIRECT-TAX LAW.

The purchase of lands sold by the tax-commissioners for taxes, under the direct-tax law, is not within the prohibition of the 8th section of the act of September 2, 1789, chap. 12, which forbids the purchase by certain officers of "public lands or other public property."

DEPARTMENT OF JUSTICE,

December 19, 1873.

SIR: Your letter of the 28th ultimo informs me that an application has been made by Mr. L. E. Chittenden, under the act of May 6, 1872, as amended by section 9 of the act of June 8, 1872, (17 Stat., 332,) for the return of money paid by him for property purchased at a tax-sale under the direct-tax law, and from which he was subsequently evicted by the former owner, and that a question has arisen upon the application, of which the following is the substance, viz: Whether the purchase made by Mr. Chittenden, who was at the time Register of the Treasury, is within the prohibition of the 8th section of the act of September 2, 1789; (1 Stat., 67;) and that on this question you desire my opinion.

The provision in the act of 1789 to which the question submitted refers is that prohibiting the purchase by certain officers of "public lands or other public property." This provision, according to its terms, would seem to apply only to the purchase of such property as belongs to, or is in the ownership of, the United States; and being highly penal it should be taken strictly, and not extended by construction. The lands which were sold for taxes by the commissioners, under the direct-tax law, were not, previous to or at the time of sale, property of that description. Until the sale the title thereto remained in the former proprietor; and though a lien existed

Computation of the Value of Foreign Coins.

thereon in favor of the United States for the amount assessed, yet they could not on that account be deemed public property. The ownership thereof might, upon the sale by virtue of the direct-tax law, become vested in the United States; but not before the sale. (*Bennet vs. Hunter*, 9 Wall., 336.) Inasmuch, then, as these lands *when offered for sale* by the tax-commissioners were not *owned* by the Government, a purchase thereof at such sale could not with propriety be regarded as a purchase of "public lands or other public property."

I am, accordingly, of the opinion that the purchase made by Mr. Chittenden is not within the prohibition mentioned.

I have the honor to be, very respectfully,

GEO. H. WILLIAMS.

Hon. WM. A. RICHARDSON,

Secretary of the Treasury.

COMPUTATION OF THE VALUE OF FOREIGN COINS.

The Secretary of the Treasury is authorized to direct the computations of the values of foreign coins at the custom-houses, when such values are to be expressed in the money of account of the United States, to be made according to the values officially estimated and proclaimed agreeably to the 1st section of the act of March 3, 1873, chap. 268; excepting *only* the sovereign or pound sterling of Great Britain, the value whereof must be computed as the same is fixed by the 2d section of that act.

DEPARTMENT OF JUSTICE,

January 8, 1874.

SIR: I have the honor to acknowledge the receipt of your letter of the 31st ultimo, requesting an opinion from me as to "whether, under the act of March 3, 1873, (17 Stat., 602,) the Secretary of the Treasury is required or authorized to direct that the computation at custom-houses, in the reduction of invoices expressed in foreign values to the money of account of the United States, shall be at the rates estimated by the Director of the Mint and proclaimed by the Secretary of the Treasury; or that fixed by the previous laws."

By the 1st section of said act it is provided: "That the value of foreign coin as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value, and the values of the standard coins

Computation of the Value of Foreign Coins.

in circulation of the various nations of the world shall be estimated annually by the Director of the Mint, and be proclaimed on the 1st day of January by the Secretary of the Treasury."

The 2d section provides: "That in all payments by or to the Treasury, whether made here or in foreign countries, where it becomes necessary to compute the value of the sovereign, or pound sterling, it shall be deemed equal to four dollars, eighty-six cents, and six and one-half mills, and the same rule shall be applied in appraising merchandise imported where the value is, by the invoice, in sovereigns or pounds sterling," &c. (The remainder of the section is unimportant in connection with the subject under consideration.)

The 3d section repeals all acts and parts of acts inconsistent with these provisions.

Previous to this legislation, Congress had, from time to time, fixed by statute the rates at which *certain foreign coins* should be estimated in computations made at the custom-houses, (see sec. 18, act of July 31, 1789, chap. 5; sec. 40, act of August 4, 1790, chap. 35; sec. 61, act of March 2, 1799, chap. 22; sec. 1, act of March 3, 1801, chap. 28; sec. 1, act of July 27, 1842, chap. 66; act of March 3, 1843, chap. 92; act of May 22, 1846, chap. 23; act of March 2, 1861, chap. 75;) and these coins, as it would seem, comprised the principal foreign coins known to our commerce. By a provision in section 61 of the act of March 2, 1799, cited above, *all other denominations of foreign money* were required to be estimated in value as nearly as might be to those rates, or according to the intrinsic value thereof, compared with money of the United States. In this connection, I may also add that the last-mentioned section authorized the President "to cause to be established fit and proper regulations for estimating the duties on goods, wares, and merchandise imported into the United States, in respect to which the original cost shall be exhibited in a depreciated currency issued and circulated under authority of any foreign government."

The statutes referred to, it will be observed, comprehended all foreign coins, giving a specific value to those which were enumerated therein, and prescribing the mode by which the value of those not enumerated therein should be estimated.

Computation of the Value of Foreign Coins.

Besides the foregoing provisions, which had for their object the ascertainment of the actual value of the merchandise imported at the place of its importation, there were other provisions, not in any way connected with the former, which permitted the payment of duties and fees at the custom-houses in certain foreign coins, at rates specifically set forth; (see sec. 30, act of July 31, 1789, chap. 5; sec. 36, act of August 4, 1790, chap. 35; sec. 74, act of March 2, 1799, chap. 22;) subject, however, to a *proviso* in the section last cited, by which no foreign coins were receivable which were not by law "a tender for the payment of all debts, except in consequence of a proclamation of the President of the United States authorizing such foreign coins to be received in payment of the duties and fees aforesaid."

Laws were passed by Congress, both before and after the date of the enactment just mentioned, regulating the value of certain denominations of foreign coins for the purpose of currency, and making them a legal tender at the rates prescribed for the payment of all debts and demands. (See act of February 9, 1793, chap. 5; act of February 1, 1798, chap. 11; act of April 30, 1802, chap. 38; act of April 10, 1806, chap. 22; act of April 29, 1816, chap. 139; act of March 3, 1819, chap. 97; act of March 3, 1821, chap. 53; act of March 3, 1825, chap. 50; act of June 25, 1834, chap. 71; act of June 28, 1834, chap. 96; act of March 3, 1843, chap. 69.) But by the 3d section of the act of February 21, 1857, chap. 56, "all former acts authorizing the currency of foreign gold or silver coins and declaring the same a legal tender in payment for debts" were repealed; and thereupon, as it would seem, by operation of the aforesaid *proviso* in section 74 of the act of March 2, 1799, foreign coins ceased to be receivable in payment of duties, at least in cases not falling within the exceptions contained in that proviso.

Thus the effect of the act of 1857 was practically to do away with all previous legislation respecting the valuation of foreign coins, except the provisions which were passed for the purpose of fixing or ascertaining the rates at which such coins should be estimated at the custom-houses in computing duties payable on imported merchandise.

It is very manifest that among the ends sought to be ac-

Computation of the Value of Foreign Coins.

complicated by the act of March 3, 1873, was that of introducing a modification of, or superseding altogether, the laws previously in force in relation to estimating the value of foreign coin; and the provisions just referred to may be said to supply the only matter of this sort found in those laws upon which that act could operate. These provisions, as I have already stated, gave a specific value to the various coins enumerated therein, which embraced the principal foreign coins known to our commerce, and also prescribed how the value should be estimated of all foreign money not therein enumerated.

The inquiry now presents itself, whether the act of 1873 was intended to have a general application, and thus include both the enumerated and non-enumerated coins in the former law; or whether it was designed to be limited in its application to coins of one of those classes only.

That statute declares, in the 1st section, "that the value of foreign coin, as expressed in the money of account of the United States, shall be that of the pure metal of such coin of standard value." This language is certainly broad enough to comprehend all foreign coins, as well those enumerated as those not enumerated in the pre-existing laws; and, taken in connection with the clause immediately following in the same section, there would seem to be no room for doubt that it was meant to have a corresponding effect. This clause reads, "*and the values of the standard coins in circulation of the various nations of the world shall be estimated annually by the Director of the Mint, and be proclaimed on the 1st day of January by the Secretary of the Treasury.*" Here all foreign standard coins in circulation are obviously contemplated; and it is plain that their values are to be estimated upon the basis prescribed by the provision of the statute quoted above—that is to say, according to the value of the "pure metal of such coin of standard value." Hence this provision must be deemed to be applicable to all standard foreign coins in circulation, and, as a necessary result, to supersede entirely the provisions of the previous laws above adverted to.

The first clause of the 1st section of the act of 1873 should be understood as furnishing the general rule by which the value of foreign coin, when expressed in the money of ac-

 Computation of the Value of Foreign Coins.

count of the United States, is to be estimated. The next clause makes provision for officially estimating and announcing the value of such coin. The latter clause was clearly intended to supplement the former, and provide a mode for giving it effect practically. But from the operation of the general rule prescribed by that section the sovereign or pound sterling of Great Britain is excepted, as the 2d section of the act contains a special provision for computing the value thereof.

With regard to the question submitted in your letter, then, I am led by the foregoing considerations to the conclusion that the Secretary of the Treasury is authorized to direct the computations of the values of foreign coins at the custom-houses, when such values are to be expressed in the money of account of the United States, to be made according to the values officially estimated and proclaimed agreeably to the provisions of the 1st section of the act of 1873, excepting *only* the sovereign or pound sterling of Great Britain, the value whereof must be computed as the same is fixed by the 2d section of that act.

I am, sir, very respectfully, your obedient servant,
 GEO. H. WILLIAMS.

Hon. WM. A. RICHARDSON,
Secretary of the Treasury.

NOTE.—The effect of the act of March 3, 1873, chap. 268, upon computations of the value of foreign coins at the custom-house, was subsequently considered by the Supreme Court of the United States during October term, 1874, in the case of *Chester A. Arthur, collector, vs. Auguste Richard et al.*; and the conclusion reached by the court in that case coincides with the view of the Attorney-General upon the same subject expressed in the foregoing opinion. The court say: The "express mandatory terms" of the act of 1873 "are, that the value of foreign coin, as expressed in the money of account of the United States, *shall be* that of the pure metal of such coin of standard value. This simple and sensible rule abrogates previous regulations on the subject; it is inconsistent with them; and the 3d section of the act expressly repeals all acts and parts of acts inconsistent with its provisions. No resort to a repeal by implication is necessary. Of course the act of 1873 does not make foreign coins receivable in cases where they were not receivable before; but where they are receivable, or where their value is material to be known, the rule for ascertaining that value is clearly laid down and determined by the law. It is true it does not itself fix the values of foreign coins except in a single instance, where special reasons require it; and it is doubtful whether the attempt to do so would

Sea-Service of Volunteer Naval Officers.

have been as judicious as the method adopted. Those values are now to be carefully ascertained and publicly announced by the proper officers of the Government. This method will insure the greatest accuracy, and will be attended with many public benefits. It is just both to the Government and the importer, because it is founded on truth; and it will be a great convenience to all persons who have any transactions in which the value of foreign money is in any way involved."

SEA-SERVICE OF VOLUNTEER NAVAL OFFICERS.

The provision in the 3d section of the act of March 2, 1867, chap. 174, declaring that transferred officers from the volunteer to the regular naval service, by whom sea-service has been performed as volunteers, "shall receive all the benefits of such duty in the same manner as if they had been, during said service, in the Regular Navy," is to be understood to mean that they shall receive whatever benefits their past sea-duty would entitle them to, if, during the period of its performance, they had belonged to the regular naval service, holding (not the same grades as those to which they are transferred, but) grades corresponding to those at that period held by them in the volunteer naval service. Intention of that provision explained.

DEPARTMENT OF JUSTICE,
January 24, 1874.

SIR: I have the honor to acknowledge the receipt of your letter of the 17th instant, and the accompanying papers, relative to the case of E. E. Bradbury, a retired naval officer.

It appears that on the 20th of March, 1871, Mr. Bradbury, then a volunteer naval officer in active service, holding the position of mate, was appointed on the retired-list of the Navy with the rank of master, under the authority given by joint resolution No. 54, approved March 3, 1871, (16 Stat., 601.)

Section 3 of the act of March 2, 1867, (14 Stat., 516,) provides "that the officers of the volunteer naval service who are, or may be, transferred to the Regular Navy or Marine Corps, shall be credited with the sea-service performed by them as volunteer officers, and shall receive all the benefit of such duty in the same manner as if they had been, during such service, in the Regular Navy or Marine Corps, and all marine-officers shall be credited with the length of time they may have been employed as officers or enlisted men in the volunteer service of the United States."

Sea-Service of Volunteer Naval Officers.

Previous to the appointment of Mr. Bradbury on the retired-list he had performed, in the aggregate, four years and one month sea-service as a volunteer officer, with which he has been credited. He now claims to be entitled for that period, under the provisions of the section above mentioned, to the difference between the pay of the grade held by him when such sea-service was performed and the pay of the grade at present held by him on the retired-list.

The question submitted by you is as to the validity of this claim.

I am unable to discover anything in the said section which gives Mr. Bradbury a right to an allowance such as is claimed by him. The provision in that section declaring that the transferred officers, by whom sea-service has been performed as volunteers, "shall receive all the benefits of such duty in the same manner as if they had been during said service in the Regular Navy," obviously means that they shall receive whatever benefits their past sea-duty would entitle them to, if, during the period of its performance, they had belonged to the regular naval service, holding (*not the same grades as those to which they are transferred, as the claimant interprets it, but*) *grades corresponding to those at that period held by them in the volunteer naval service.* Now, there was no difference between the pay of volunteers and the pay of regulars of corresponding grades when on sea-service; so that, in respect to *compensation* for such service, the transferred officers having already received as volunteers what they would have been allowed as regulars, it is not perceived that any benefit of a pecuniary character could be claimed by them on that account.

The intention of that provision, I think, may be satisfactorily explained thus: By the statutes in force at the date of its enactment authorizing officers of the volunteer naval service to be transferred to the regular naval service, (see act of July 25, 1866, 14 Stat., 222; also, act of May 17, 1864, 13 Stat., 79,) the transfers were confined to the four grades in the latter service, from ensign to lieutenant-commander, inclusive; and by the regulations of the Navy a certain period of service (formerly two years, at present one year) was required of officers in those grades before, as a general rule, they were nominated for promotion to the next higher grades.

Claims for Property Lost in the Military Service.

(See Regulations of 1865, page 46, par. 257, Regulations of 1870, page 130, par. 899.) Besides, officers in the Navy generally are credited with their sea-service, with a view to its being taken into consideration in their future assignment to duty; but, excepting those who belong to the four grades mentioned, they derive no other advantage therefrom that I am aware of. The design of the provision referred to, then, was to give the transferred officers the full benefit of their former sea-service, in so far as it might go to complete the period of such service required in their respective grades previous to nomination for promotion, and in so far as it ought properly to be taken into account in the matter of assignment to duty. Beyond these advantages, the provision would seem to confer nothing.

I am, accordingly, of the opinion that the claim of Mr. Bradbury is invalid.

I have the honor to be, sir, very respectfully,

GEO. H. WILLIAMS.

Hon. WM. A. RICHARDSON,

Secretary of the Treasury.

CLAIMS FOR PROPERTY LOST IN THE MILITARY SERVICE.

The 1st and 2d sections of the act of March 3, 1849, chap. 139, provide respectively for a separate and distinct class of claims. The two classes distinguished from each other.

Claims of officers and soldiers for horses lost in the military service, where their horses were in service simply as a part of the equipment belonging to and furnished by them, are allowable only under the provisions of the 1st section.

But where the property was in service by impressment or contract, and not merely by being a part of the equipment furnished by the officer or soldier, such claims are allowable under the provisions of the 2d section, which contains no restrictions as to *persons*.

Horses which constitute a part of the equipment of officers and soldiers, furnished by themselves, are not in the military service by "contract," much less by "impressment," within the meaning of the term as employed in the latter section.

DEPARTMENT OF JUSTICE,

February 5, 1874.

SIR: Your letter of the 22d December last, referring to a difference of opinion shown by the papers transmitted there-

Claims for Property Lost in the Military Service.

with to exist between the Adjutant-General of the Army and the Second Comptroller of the Treasury in relation to the settlement of claims under the act of March 3, 1849, chap. 139, asks an opinion from me touching the question upon which those officers differ.

That question seems to be this : Whether claims of officers and others described in the 1st section of said act, for horses lost in the military service, are allowable under the provisions of that section solely ; or whether such claims may also be allowed under the provisions of the 2d section of the same act.

It appears to me, upon examination of the two sections mentioned, that they provide each for a separate and distinct class of claims.

The 1st section is manifestly limited to cases of damage sustained in any of the ways therein described, by officers and soldiers who, by reason of their grade, or arm, or duties, are required to be mounted ; and it is very clear that the provisions thereof respecting horses lost by such persons while in the military service are applicable only to the loss of horses which they had furnished and kept in service as a part of their equipment. The peculiar feature of the cases covered by this section, therefore, would seem to consist in the fact that the property lost constituted at the time of its loss a part of the equipment furnished by an officer or soldier whose duties, arm, or grade required him to be mounted.

The 2d section, on the other hand, extends to cases of damage sustained by any person in the loss of property of the kind designated therein, including horses, from any of the causes or under any of the circumstances therein enumerated, where the property was, at the time of the loss, in the military service either by impressment or contract, and where the risk of the property was not agreed to be incurred by the owner. Horses belonging to the category adverted to in connection with the 1st section, that is to say, those which constitute a part of the equipment of officers and soldiers, furnished by themselves, are not, I think, to be considered as in the military service by " contract," much less by " impressment," within the meaning of the term as employed in the 2d section. By the conditions of the service in which the officer

Moneys Paid into United States Courts.

or soldier is employed, or by his engagement with the Government, he may be required to provide himself with a horse to perform that service; yet a horse which has entered the military service in this manner is not, in the said act or in any former act, contemplated as being in such service by contract.

Regarded from this point of view, then, claims of officers and soldiers for the loss of such horses are not cognizable under the last-named section.

But it is otherwise where the officer or soldier has sustained damage by the loss of a horse in the military service, which at the time of its loss was in such service, not by being a part of his equipment, but by actual impressment or contract; for there is no restriction in that section as to *persons*.

With respect to the question presented, I am accordingly of the opinion that claims of officers and soldiers for horses lost in the military service, where their horses were in service simply as a part of the equipment belonging to and furnished by them, are allowable under the provisions of the 1st section of the act of 1849 only; but that where the property was in service by impressment or contract, and not merely by being a part of the equipment furnished by the officer or soldier, such claims may and should be allowed, if otherwise unobjectionable, under the provisions of the 2d section of the same act.

I have the honor to be, very respectfully,

GEO. H. WILLIAMS.

Hon. WM. A. RICHARDSON,

Secretary of the Treasury.

MONEYS PAID INTO UNITED STATES COURTS.

The act of March 24, 1871, chap. 2, does not repeal the laws previously in force relating to moneys paid into the courts of the United States, or received by the officers thereof, which are of a *special* character and apply only to moneys thus paid or received in particular classes of cases, as proceedings in prize and bankruptcy proceedings; it repeals merely the *general* law on the subject, as embodied in the two statutes mentioned in the 6th section.

Accordingly, the disposition of moneys paid into the United States courts or received by the officers of such courts, in bankruptcy proceedings, is governed since the act of 1871, as it was prior thereto, by the provisions of the bankruptcy acts and the rules prescribed in pursuance thereof.

Moneys Paid into United States Courts.

Semble that there is no law making it the duty of the assistant treasurers, with whom moneys are deposited under the provisions of the act of 1871, to keep a detailed account in respect of the *causes* to which the deposited moneys appertain.

DEPARTMENT OF JUSTICE,

February 5, 1874.

SIR: Your letter of the 3d of December last, in regard to the deposit of moneys paid into United States courts, or received by officers of such courts, in causes pending or adjudicated therein, presents for my consideration substantially the following questions:

1. Whether the act of March 24, 1871, entitled "An act relating to moneys paid into the courts of the United States," (17 Stat., 1,) is applicable to moneys paid or received as aforesaid in bankruptcy proceedings.

2. Whether it is incumbent on the assistant treasurer, with whom moneys are deposited under the provisions of that act, to open and keep a separate and detailed account for each cause in which the moneys so deposited had been received or paid.

Previous to the act of 1871, mentioned above, the *general* law on the subject of moneys paid into said courts or received by officers thereof was embodied in the two statutes repealed by the 6th section of that act. In addition to this general law there also existed other laws, of a *special* character, enacted since the date of those statutes, which applied only to moneys there paid or received in particular classes of cases, as proceedings in prize and proceedings in bankruptcy. These special laws were not, I think, intended to be superseded by the act of 1871, but only the general law adverted to; and the express repeal by that act of the two statutes containing the latter, taken in connection with the circumstances that it does not enact any new provision wholly inconsistent with the continuance in force of the former, may be regarded as strongly corroborative of this view.

I am, therefore, of the opinion that the act of 1871 has no application to moneys paid into the United States courts or received by officers of such courts in bankruptcy proceedings. The deposit of such moneys is governed by the provisions of

Distribution of Prize.

the bankruptcy acts and the rules prescribed in pursuance thereof, with which you are already familiar.

As to the manner in which accounts shall be kept by the assistant treasurers of moneys that may be deposited with them under the provisions of that act, the statute itself contains no specific directions.

By the 1st section the deposit is required to be "in the name of and to the credit of" the court, and a general account opened and kept by the assistant treasurer with the court, crediting and debiting the latter with the moneys deposited and drawn by it, would seem to be all that the statute contemplates.

The 3d section plainly devolves upon the clerk of the court the duty of keeping an account showing in what causes the moneys were deposited and in what causes payments have been made, &c.; and this appears to be the only separate and detailed account required to be kept in respect of the *causes* to which the deposited moneys appertain. At all events, I find no provision of law making it the duty of the assistant treasurers, with whom the moneys are deposited, to keep such an account.

I have the honor to be, very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. WM. A. RICHARDSON,
Secretary of the Treasury.

DISTRIBUTION OF PRIZE.

A corporal of a volunteer regiment was detached from his company for service in the "Mississippi Marine Brigade," and while in that service participated in the capture of a prize, whereby he became entitled to share in the residue of the proceeds thereof, after making certain deductions, in proportion to the rate of his pay. He alleges that, when the prize was taken, he was acting as a first lieutenant by direction of the commander of the brigade. A few days before that event, a commission was issued appointing him a first lieutenant in the brigade; but owing to causes beyond his control he did not receive it, and had no knowledge of its existence until several months afterward. He claims a share of the proceeds of the prize as a first lieutenant, though he is entered only as a private upon the prize-list of the vessel on which he served. *Held* that if, as claimant alleges, he was performing the duties of first lieu-

Distribution of Prize.

tenant at the period of the capture, then, inasmuch as in such case he would be entitled to the pay of that grade under the provisions of the joint resolution of July 11, 1870, amendatory of the joint resolution of July 26, 1866, he would be equally entitled to share in the prize in proportion to the rate of that pay.

DEPARTMENT OF JUSTICE,
February 6, 1874.

SIR: I have the honor to acknowledge the receipt of your letter of the 14th ultimo, inclosing papers relating to a claim of George W. Bailey for prize-money.

It appears by these papers that some time prior to January, 1863, Mr. Bailey, while serving as a corporal in Company I, Fifty-ninth Illinois Volunteers, was detached from his company for service in the "Mississippi Marine Brigade," under the command of General Ellet, and that he was in this service on the 3d of February, 1863, when the prize referred to in the papers was taken, and participated in the capture. He subsequently became a prisoner of war, and remained such until June 10, 1863. On the 30th of January, 1863, a commission was issued appointing him a first lieutenant in said brigade, to take rank from January 1, 1863, but owing to causes beyond his control he did not receive it, and, in fact, had no knowledge of its existence until after his release from captivity on the 10th of June, 1863.

It is alleged that after Mr. Bailey was attached to the "Mississippi Marine Brigade" he acted as a first lieutenant therein, and also as adjutant thereof, by direction of General Ellet, and that he was acting as a first lieutenant when the prize was taken. But it seems that he is entered only as a private upon the prize-list of the vessel on which he was then serving. However, he claims a share of the proceeds of the prize, not as a private, but as first lieutenant.

Here the question naturally arises, whether, under the circumstances of the case, Mr. Bailey is legally entitled to share in the prize as a first lieutenant. And this I take to be the point on which my opinion is desired.

The law regulating the distribution of prize provides that after making deductions for certain officers, &c., the residue of the proceeds shall be divided among all others doing duty on board "in proportion to their respective rates of pay in

Distribution of Prize.

the service ;” and the class included by this provision is the one to which Mr. Bailey is understood to belong. To determine, then, whether he is entitled to share in the prize as a first lieutenant, it is only necessary to inquire whether he is, by law, entitled to the pay of a first lieutenant for his services when the prize was taken.

If, as is alleged, Mr. Bailey was at that time performing the duties of first lieutenant, there would seem to be no room for doubt that he is entitled to the pay of a first lieutenant for such service, under the provisions of the joint resolution of July 11, 1870, amendatory of the joint resolution of July 26, 1866, (16 Stat., 385; 14 Stat., 368.) A case very similar to this was considered by my predecessor, where a non-commissioned officer of volunteers was designated by the colonel of his regiment to take command of a company to fill a vacant captaincy, and, after having entered upon the duties of his new position, a commission was subsequently issued appointing him captain of the company, but on account of military operations and other causes he did not receive the commission until about two months afterward; and it was held that, under the provisions mentioned, the officer was entitled to a captain's pay for that period. (See 13 Opin., 413, 414.)

In Mr. Bailey's case, the commission was issued on the 30th of January, 1863, four days before the capture transpired; and under those provisions, as interpreted and applied by my predecessor in the case above referred to, he is clearly entitled to a lieutenant's pay from that date, provided he was then performing the duties of the grade of lieutenant.

In conclusion, I may state that, while I express no opinion as to the question of *fact* involved in this matter, whether or not Mr. Bailey was acting as a first lieutenant when the capture took place, yet I think that, in case he was thus acting at that time, inasmuch as in such case he seems to be legally entitled to a lieutenant's pay for his services, he is also legally entitled to share in the prize in proportion to the rate of that pay.

I am, sir, very respectfully, your obedient servant,
GEO. H. WILLIAMS.

Hon. GEO. M. ROBESON,
Secretary of the Navy.

Case of Lieutenant Mansur.

CASE OF LIEUTENANT MANSUR.

Where an official opinion from the Attorney-General is desired on questions of law arising on any case, the request should be accompanied with a statement of the material facts of the case, and also the precise questions on which advice is wanted.

Lieutenant Mansur went on an expedition up the Red River, leaving his horse and saddle behind with the regiment to which he belonged. During his absence the horse and saddle were, by order of the colonel of his regiment, taken and used in the military service without his knowledge and consent, and while so in such service were lost; claim being made by him for the value of the property under the act of March 3, 1849, chap. 129: *Held* that the case falls within the 2d section, and not the 1st section, of that act.

DEPARTMENT OF JUSTICE,
February 16, 1874.

SIR: I have the honor to acknowledge the receipt of your letter of the 7th instant, returning the papers which accompanied an opinion relative to the settlement of certain classes of claims under the act of March 3, 1849, given by me on the 5th instant in answer to your letter of the 22d of December last, (see *ante*, p. 360,) and requesting a further opinion as to whether the case of Lieutenant Mansur, referred to in the first-mentioned letter, falls under the 1st or 2d section of that act.

This last request, as it would seem, is prompted by an apprehension that the construction put upon those provisions in my opinion of the 5th might, in connection with that case, be understood differently by the accounting-officers of the Treasury on the one hand, and by the officers of the War Department on the other, between whom a diversity of views already exists in regard to the same provisions.

Your letter of the 22d of December, in response to which that opinion was written, neither stated any particular case nor submitted any particular question for my consideration, but presented its subject in a very general way, concluding with a request for an expression of my views "on the several questions involved." The opinion quite naturally partook of the same general character. I deem it proper here to remind you that where an official opinion from the head of this Department is desired on questions of law arising on

Case of Lieutenant Mansur.

any case, the request should be accompanied with a statement of the material facts of the case, and also the precise questions on which advice is wanted. By the observance of this simple rule the real point of difficulty in the case will be at once perceived, much inconvenience avoided, and more practicable and satisfactory results obtained.

Respecting the case of Lieutenant Mansur, I do not discover among the papers submitted any statement of facts other than what is found in the certificate of the Third Auditor of October 25, 1873, and in his report made to you under date of December 9, 1873. In the former it is stated by the Auditor that a horse and saddle of Lieutenant Mansur were "impressed by order of Colonel E. W. Woodman of the Second Regiment Maine Cavalry, at New Orleans, and lost on the 10th of May, 1864, while in the military service of the United States." In the other paper he states that "the evidence shows conclusively that while claimant was absent on the Red River expedition his horse and saddle, which he had left with the regiment at New Orleans, Louisiana, were, by order of his colonel, taken and used in the service of the United States; that the exigencies of the service demanded the taking and use of the property, and that it was done without the knowledge or consent of the claimant; that the property was lost while so in the service, and was one of the kind of horses for which indemnity is provided in the 2d section of the act of March 3, 1849."

Upon this state of facts I think it clear that the case falls within the 2d section, and not the 1st section, of the act of 1849. In arriving at this conclusion, it is assumed that the horse had been furnished and kept by Lieutenant Mansur for his own use as a part of his equipment for service. But I perceive nothing in that circumstance which prevented it from being *impressed* for some other military use or purpose; and if it was so impressed it was then as properly in the military service by impressment as it would have been if it had never constituted a part of that officer's equipment. In the opinion hereinbefore referred to I have already expressed the view that where lost property of this kind belonging to an officer or soldier was in the military service by impressment at the time of its loss, the claim of the officer or soldier

Condemned Vessels of the Navy.

is properly cognizable under the 2d section of the said act—that section containing no restriction as to *persons*, but including officers and soldiers as well as civilians.

I am, sir, very respectfully, your obedient servant,
GEO. H. WILLIAMS

Hon. WM. A. RICHARDSON,
Secretary of the Treasury.

CONDEMNED VESSELS OF THE NAVY.

The Secretary of the Navy cannot exchange a vessel belonging to the Navy, which has been condemned as unfit for naval purposes, for another vessel, notwithstanding the exchange might be of advantage to the public service. The disposition of such vessel is controlled by the 2d section of the act of May 23, 1872, chap. 195.

DEPARTMENT OF JUSTICE,
February 18, 1874.

SIR: I have the honor to acknowledge the receipt of your letter of the 16th instant, in which you say that your Department has received an offer to exchange a good ship for one which has been condemned as unfit for naval purposes.

You further state that the contemplated exchange would be altogether advantageous to the Government, and desire me to inform you if I am aware of any law that will prohibit the Department from making the transaction.

I respectfully refer you, for answer, to section 2 of the act approved May 23, 1872, (17 Stat., 154,) from which it appears that the Secretary of the Navy is empowered "to sell, at public sale, such vessels and materials of the United States Navy as, in his judgment, cannot be advantageously used," &c.; but it is provided "that notice of such sale, containing a description of the property to be sold, shall be published" in some leading newspaper or newspapers in at least four of the principal cities of the United States. A further provision is made that "the total amount received on such sales shall be covered into the United States Treasury."

My opinion is that this section prohibits the exchange of one vessel for another, according to the proposal described in your letter, and that the Secretary of the Navy can only dis-

Authority of Internal-Revenue Officers.

pose of vessels and materials belonging to the United States and under the control of his Department in manner as prescribed in said section.

Very respectfully,

GEO. H. WILLIAMS.

Hon. GEO. M. ROBESON,
Secretary of the Navy.

AUTHORITY OF INTERNAL-REVENUE OFFICERS.

Where a lot of ale, while still within the brewery in which it was made, was seized under judicial process emanating from a State court as a forfeiture to the State, and is in the custody of the sheriff awaiting the judgment of the court: *Held* that the possession of the sheriff cannot be legally interfered with by internal-revenue or other officers of the United States. Nor can those officers legally interfere with the sale of such property by the sheriff, in the execution of a judgment of condemnation by the court. When, however, the property passes from under the control of the court, and goes again into private hands, it may be dealt with under the internal-revenue laws as such laws provide.

Hence, in case it is removed from the brewery without the internal-revenue tax thereon being paid, the United States officers may seize it after the sale by the State authorities, and when it passes into the possession of the purchaser, for non-payment of such tax.

DEPARTMENT OF JUSTICE,
February 20, 1874.

SIR: I have the honor to acknowledge the receipt of your letter of the 22d ultimo, in which, at the request of the Commissioner of Internal Revenue, you present a case of supposed conflict between the police laws of the State of Vermont and the internal-revenue laws of the United States, and submit for my opinion certain questions arising upon the following state of facts:

"A brewer making ale, and having no right to remove the same from his brewery for consumption, &c., without the same being stamped according to the laws of the United States, in manufacturing such liquor commits a crime against the laws of Vermont, by which, among other consequences, the ale in question becomes forfeited to the State, and, when condemned upon proper judicial proceedings, is to be sold under the authority of the State by its agents for medicinal,

Authority of Internal-Revenue Officers.

chemical, or mechanical purposes, pursuant to a statute. While the ale thus manufactured is still in the brewery or store-house, and before it has become forfeited to the United States for any cause, having become forfeited to the State of Vermont for being thus manufactured for sale, it is seized upon judicial process of the State and held by the sheriff for a trial."

You ask :

"1. Can, in such case, the sheriff be interfered with by the officers of the United States in his possession of the liquor, for any cause ?

"2. A proper judgment of forfeiture and condemnation having been rendered, can the execution of that judgment be interfered with by the authority of the United States, by taxation or otherwise ?"

Mr. Justice Miller, in delivering the opinion of the court in the case of *Buck vs. Colbath*, (3 Wall., 334,) referring to a principle of law upon which some antecedent cases were decided, says, "That principle is that whenever property has been seized by an officer of the court by virtue of its process, the property is to be considered as in the custody of the court, and under its control for the time being ; and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises. This is the principle upon which the decision of this court rested in *Taylor vs. Caryl*, (20 How., 583,) and *Hogan vs. Lucas*, (10 Pet., 400,) both of which assert substantially the same doctrine. A departure from this rule would lead to the utmost confusion, and to endless strife between courts of concurrent jurisdiction deriving their powers from the same source ; but how much more disastrous would be the consequences of such a course in the conflict of jurisdiction between courts whose powers are derived from entirely different sources, while their jurisdiction is concurrent as to the parties and the subject-matter of the suit."

This decision appears to be applicable to the facts stated, and is adverse to the claim of the United States. Revenue-officers of the Government, it seems to me, can have no

Authority of Internal-Revenue Officers.

greater power to interfere with the proceedings of a State court than would a marshal acting under process from a court of the United States; especially, as in this case, where the property is forfeited to and belongs to the State government.

By the 67th section of the act of July 13, 1866, (14 Stat., 172,) it is provided that "all property taken or detained by any officer or other person under authority of any revenue-law of the United States shall be irrepleviable, and shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof." But it is understood that in the case under consideration the property was not, at the time of seizure, detained by any officer or other person under authority of the revenue-laws, and hence this provision offered no legal impediment to such seizure.

My opinion, therefore, is that the sheriff cannot be legally interfered with by the officers of the United States in his possession of the ale seized by him as aforesaid, and, as a necessary consequence, that those officers cannot legally interfere with the disposition of the property in the execution of the judgment of the court under whose process the ale was seized.

I think it proper, however, to add, that when the property passes from under the control of the court and goes again into private hands, it may be dealt with under the revenue-laws of the United States as such laws provide. The seizure and sale by the State authorities would create no exemption from the operation of those laws.

By section 28 of the act of June 6, 1872, (17 Stat., 249,) it is provided that "the ownership or possession by any person of any fermented liquor after its sale or removal from brewery or warehouse, or other place where it was made, upon which the tax required shall not have been paid, shall render the same liable to seizure wherever found, and to forfeiture," removal under permits excepted. I think that under this provision fermented liquors seized and sold by the authorities of a State in execution of its police laws might be again seized in the hands of the purchaser therefrom, by the United States authorities, where it has been re-

State-Banking Associations.

moved from the brewery or warehouse, and the tax required thereon by the internal-revenue laws has not been paid. To avoid such results those laws provide that where property required to have stamps placed thereon is sold by the United States officers upon distraint or forfeiture, the same not having been stamped as required, it shall be the duty of the officer selling to fix, or cause to be fixed, stamps on the property, upon the sale thereof. (See section 17, act of July 13, 1866, 14 Stat., 152.)

Very respectfully,

GEO. H. WILLIAMS.

Hon. WM. A. RICHARDSON,
Secretary of the Treasury.

STATE-BANKING ASSOCIATIONS.

The phrase "State-banking associations" used in the 6th section of the internal-revenue act of March 3, 1865, chap. 78, as amended by the act of July 13, 1866, chap. 184, comprehends not only associations organized under State-banking laws, but associations or partnerships formed by private agreement for the purpose of carrying on the business of banking.

It may also be taken to include a railroad company issuing scrip in the form of currency, where the issue by the company possesses the essential characteristics of a banking operation.

DEPARTMENT OF JUSTICE,
February 23, 1874.

SIR: I have considered the question submitted by you, at the instance of the Commissioner of Internal Revenue, in your letter to me of the 22d of November last, viz: "Whether the phrase 'State-banking associations,' used in the 6th section of the internal-revenue act of March 3, 1865, as amended in the law of July 13, 1866, (14 Stat., 146,) should be taken to refer exclusively to associations organized under what are known as State-banking laws, or whether it includes an ordinary business partnership formed between two or more individuals for the purpose of doing a banking business, or a railroad company issuing scrip in the form of currency."

The section to which you refer, as amended, reads thus: "*And be it further enacted*, That every national banking asso-

State-Banking Associations.

ciation, State bank, or State-banking association, shall pay a tax of ten per centum on the amount of notes of any person, State bank, or State-banking association, used for circulation and paid out by them after the 1st day of August, 1866, and such tax shall be assessed and paid in such a manner as shall be prescribed by the Commissioner of Internal Revenue."

The main purpose of that provision obviously was to put a check upon the circulation as money of notes of the description mentioned therein, and to secure for the country in lieu thereof the advantages of a uniform currency, which Congress had undertaken to supply. Keeping this in view, the meaning and scope of the phrase mentioned will be apprehended without difficulty.

It may be reasonably presumed that, in taxing the amount of notes paid out by the banking associations of the States, there was no intention on the part of Congress to make a discrimination against banking companies acting under special acts of incorporation, or organized under some general statute of a State, and in favor of companies established for banking purposes under private agreement, by subjecting the former only to the tax, and leaving the latter free to pay out their notes exempt from taxation. The end being to restrain the circulation of the notes, such a discrimination would not be consonant with that end, but tend to partially defeat it.

Plainly, then, the expression "State-banking association" was used in its most comprehensive sense, as signifying any association of persons engaged in the business of banking within any State, (other than a "national banking association," which was already named in the enactment,) whether constituted under a private agreement merely or formed under some special or general act of the State. In the absence of legislative restrictions, banking may be carried on in the States by individuals and partnerships in all its various departments of receiving deposits, discounting paper, issuing notes, &c.; and if a State by interposing no restrictions tacitly permitted these functions to be exercised by a partnership or unincorporated company, it would be the same in legal contemplation as if the partnership or company were *expressly*

Sioux City and Pacific Railroad Company.

authorized thereunto by positive law. Such partnership or company might be as appropriately called a "State-banking association" as an association of individuals incorporated for similar objects under a special or general statute of the State; and it would make no difference in this respect, I conceive, where but one or two of those functions were exercised by the partnership or company.

I am, accordingly, of the opinion that the expression referred to may be taken to include not only associations or ganized under State-banking laws, but associations or partnerships formed under private agreement for the purpose of carrying on the business of banking. Whether it may also be taken to include a "railroad company issuing scrip in the form of currency" depends upon whether the issue by the company possesses the essential characteristics of a banking operation. If so, I think such company would be equally within the terms employed by Congress.

I have the honor to be, very respectfully,

GEO. H. WILLIAMS.

Hon. WM. A. RICHARDSON,

Secretary of the Treasury.

SIoux CITY AND PACIFIC RAILROAD COMPANY.

The Secretary of the Treasury has authority, under the 2d section of the act of March 3, 1873, chap. 226, to withhold payments for transportation services rendered by the Sioux City and Pacific Railroad Company to the United States over the Fremont, Elkhorn and Missouri Valley Railroad, a road *leased* by that company, in case of default on the part of the company to re-imburse the Government for interest paid upon the bonds of the United States issued thereto.

DEPARTMENT OF JUSTICE,

February 24, 1874.

SIR: I have the honor to acknowledge the receipt of your letter of the 12th instant, in which you submit for my opinion the question as to whether or not the Secretary of the Treasury may, under the 2d section of the act approved March 3, 1873, (17 Stat., 508,) withhold from the Sioux City and Pacific Railroad Company compensation for transportation services rendered to the United States upon the Fre-

Sioux City and Pacific Railroad Company.

mont, Elkhorn and Missouri Valley Railroad, upon the following state of facts:

Said Sioux City and Pacific Railroad Company own a road running from Sioux City, Iowa, to Fremont, Nebraska, to aid in the construction of which it received bonds from the United States, but has not paid the interest upon those bonds. Transportation services have been rendered by it to the United States upon this line of road, the payments for which have been withheld by the Secretary of the Treasury. It has leased for twenty years said Fremont, Elkhorn and Missouri Valley Railroad, which was constructed without aid from the United States.

The section referred to is as follows: "That the Secretary of the Treasury is directed to withhold all payments to any railroad company and its assigns on account of freights or transportation over their respective roads *of any kind* to the amount of payments made by the United States for interest upon bonds of the United States issued to any such company, and which shall not have been re-imbursed, together with the five per cent. of net earnings due and unapplied as provided by law," &c.

Congress intended, as I understand this provision of law, to make a railroad company which has received bonds from the United States, and which had neglected or refused to re-imburse the Government for the interest paid upon those bonds, together with five per cent. upon its net earnings, due and unpaid, a debtor to the United States for that amount.

Manifestly, the object was to enable the Secretary of the Treasury to offset the indebtedness against any claim by such railroad company for transportation services rendered by it to the United States upon any railroad which it owned or controlled, without reference to the fact as to whether or not the Government had aided in the construction of such road. I think that a road leased by a company indebted as aforesaid is to be regarded for the purposes of this act as its road. Payment is to be withheld from any railroad company indebted as aforesaid on account of freights or transportation over its road of any kind, which language, it seems to me, was made expressly comprehensive so as to exclude the conclusion that payments were to be withheld for services upon

TO THE SECRETARY OF THE TREASURY.

Distribution of Moieties.

those particular roads only that had received lands or bonds from the Government to aid in their construction.

My opinion, therefore, is that the Secretary of the Treasury has the right under the said act to withhold payment for transportation services rendered by said company to the United States upon the Fremont, Elkhorn and Missouri Valley Railroad.

Very respectfully,

GEO. H. WILLIAMS.

Hon. JNO. A. J. CRESWELL,
Postmaster-General.

DISTRIBUTION OF MOIETIES.

A suit was instituted against a firm to recover a penalty for an alleged violation of the 1st section of the act of March 3, 1863, chap. 76, and while it was pending other violations of the same section by the firm were discovered; whereupon, to avoid further litigation, the firm sought to compromise the whole matter with the Government, and a compromise was finally agreed upon, embracing not only the claim on which suit had been brought, but claim in respect of the violations of law last above mentioned. By the terms of the compromise the Government was to release the latter claims, and the firm was to consent to the entry of a judgment for a certain amount in said suit. The compromise was carried into effect, and the amount of the judgment paid. On a question between adverse claimants of the "moieties" of the fund belonging to the collector and naval officer: *Held* that, in determining the rights of the respective claimants, (some of whom were in office when the suit was commenced, but went out before the subsequent violations of the statute were discovered; others came into office when the former retired therefrom, and remained in until after the compromise was effected,) all of the liabilities in discharge of which the money was actually paid should be taken into account; that the shares of the collector and naval officer, distributable out of the money, may be divided among the respective claimants; and that the division may be based on the computations or estimates, in the various claims against the firm, with reference to which the amount paid was agreed upon in the compromise.

DEPARTMENT OF JUSTICE,

March 5, 1874.

SIR: I have the honor to acknowledge the receipt of your letter of the 29th of January last, submitting for my opinion questions in regard to the distribution of moieties out of cer-

Distribution of Moieties.

tain funds recovered in satisfaction of penalties and forfeitures incurred under the customs-laws.

The facts of the case, as shown by your letter and by the papers which accompanied it, appear to be in substance the following :

In January, 1870, an action of debt was brought in behalf of the United States, in the United States district court for the southern district of New York, against the firm of Weld & Co., to recover a large amount as penalty for an alleged violation of the 1st section of the act of March 3, 1863, (12 Stat., 737, 738.) About the same period an action *in rem* was also commenced by the United States, in the same court, against a lot of coffee as forfeited under the revenue-laws, in which the firm of Weld & Co. intervened as claimants. When these suits were instituted, M. H. Grinnell and E. A. Merritt held the offices of collector and naval officer, respectively, of the port of New York, in which the penalty and forfeiture sued for were stated to have been incurred ; but those gentlemen went out of office before the determination of the suit, and were succeeded by Thomas Murphy, as collector, and C. H. Laffin, as naval officer. During the official incumbency of these last-named gentlemen, evidence of other violations of the said section by the firm of Weld & Co., at the same port, was discovered. On receiving information of this, the firm, to avoid being subjected to further litigation, sought to compromise the whole matter with the Government. A compromise was finally agreed upon in April, 1873, which embraced the claims of the Government against the firm in respect of the violations of law just referred to, and also the claims on which the above-mentioned suits, then still pending in court, had been brought. By the terms thereof the Government was to release Weld & Co. from all the said claims on which no judicial proceedings had been instituted, and consent to the entry of a judgment, as upon a verdict for the claimants, in the aforesaid action *in rem*; while Weld & Co. were to consent to the entry of a judgment against them for the sum of \$75,000, without costs, in the aforesaid action of debt, and also to the entry of an order for a certificate of probable cause of seizure in the action *in rem*. The compromise was subsequently carried into effect agreeably to these

Distribution of Moieties.

terms; and the said sum having been paid into court by Weld & Co., in satisfaction of the judgment entered against them, the money so paid, after deducting therefrom costs of suit, has since been turned over to the Treasury for distribution.

Conflicting claims are now presented for the "moieties" or shares of this money belonging to the *collector* and *naval officer* by virtue of the statutory provisions regulating the disposition of the proceeds of penalties and forfeitures incurred under the customs-laws.

On the one hand, Messrs. Grinnell and Merritt claim the whole of the shares distributable to those officers by law, the ground of the claim being that the money was received on a judgment in a suit instituted while they were in office. On the other hand, Messrs. Murphy and Lafin claim a *proportionate part* of those shares; this claim resting on the ground that the money was paid as well in satisfaction of the demands which arose while the latter claimants were in office as in discharge of the demand on which such suit was brought.

Referring to the compromise, you state that "*in arranging the amount finally agreed upon*, there is every appearance that the compromising parties on behalf of the Government considered all the cases, as well those in which no suit had been commenced as others, and accepted a penalty supposed to be adequate to all the discovered or supposed offenses." This, indeed, is submitted as among the ascertained facts of the case.

The questions on which my opinion is desired are:

1. "Can the Department divide the collector's and naval officer's shares of the money received in compromise between the two sets of claimants, in proportion to the estimated amount of undervaluations or other claims of the United States?" or,
2. "Have Messrs. Grinnell and Merritt a vested right by virtue of the fact that this money was taken under the terms of the compromise in satisfaction of a judgment in a suit commenced while Grinnell was collector and Merritt naval officer?"

The distribution of the money received for penalties and forfeitures in this case is governed by the 1st section of the act of March 2, 1867, (14 Stat., 546.) But the questions pro-

Distribution of Moieties.

pounded do not seem to involve the construction of any of the provisions of that enactment, or call for special observation thereon.

In determining the rights of the respective claimants to the shares in question, I incline to the view that all of the liabilities in discharge of which the money was actually paid should be taken into account. There can be no doubt that if the two suits which were instituted while Messrs. Grinnell and Merritt held office had not been made the subject of compromise, but had been successfully tried and prosecuted to judgment, such portions of the penalties and forfeitures thereby recovered as were distributable to the collector and naval officer under the statute would have belonged exclusively to those gentlemen, though their official relations with the Government may have terminated during the pendency of the suits in court and before the judgments in them were rendered. So as regards the claims for penalties discovered while Messrs. Murphy and Lafin were in office; had suits then been commenced thereon, or a compromise entered into embracing no other claims, it cannot be doubted that so much of the money thus recovered in satisfaction thereof as was distributable under the statute to the collector and naval officer would have belonged to the last-named gentlemen exclusively.

Now, carrying the hypothesis still further, if, instead of undertaking to obtain a separate recovery in each of these cases, an agreement of compromise had been made by the Government with the parties liable, whereby the whole of the claims for penalties and forfeitures were settled by payment of a certain sum *directly over to the customs-officer authorized to receive it*, I conceive that, with respect to the shares of the collector and naval officer in the funds so paid, the rights of all the above-mentioned persons would remain precisely the same, and that the only question would be as to the *relative* proportion to which they were respectively entitled out of those funds.

The hypothetical case here put, it will be seen, differs from the actual case under consideration only in the *mode of payment*. In the latter case the money was *formally* paid in satisfaction of a judgment by confession in a suit for penalties,

Distribution of Moieties.

but the payment was really made in carrying into effect a compromise or composition previously entered into, which comprehended other claims for penalties than the one involved in that suit, and which was the means whereby the confession of the judgment itself was brought about; and the difference in the mode of payment certainly could not change the character of the funds received under the composition, or affect the rights of parties thereto in respect of the claims covered by the composition.

Reference in support of a contrary view is made to the case of *Jones vs. Shore's executors*, (1 Wheat. Rep., 462,) and other authorities, in which it is stated that the right of custom-house officers to forfeitures *in rem* attaches on seizures, and to personal penalties on suits brought. But they are inapplicable to the subject under consideration, for the reason that they relate to a controversy between custom-house officers by whom a suit is commenced for a penalty, and their successors in office by whom the money in the suit was received; whereas the question here is as to the right of custom-house officers to penalties which are settled and paid without suit. Custom-house officers obviously cannot acquire any right in penalties incurred after they cease to be such officers.

Regarding the matter in this light, I am led to the conclusion that the shares of the collector and naval officer, distributable out of the money paid by Weld & Co. in this case, may be divided by you between "the two sets of claimants" mentioned, and that such division may be based upon the computations or estimates in the various claims against that firm, with reference to which the amount so paid was agreed upon in the compromise.

I am, sir, very respectfully, your obedient servant,
GEO. H. WILLIAMS.

Hon. WM. A. RICHARDSON,
Secretary of the Treasury.

Valuation of Foreign Coin.

VALUATION OF FOREIGN COIN.

The designation of the "first day of January," in the 1st section of the act of March 3, 1873, chap. 268, as the time for the performance of the duty, thereby devolved upon the Secretary of the Treasury, of making proclamation of the values of foreign coins annually estimated by the Director of the Mint, is not to be regarded as directory merely, but as a limitation upon the authority of the Secretary; he is authorized and required to make such proclamation at the time designated, and at no other.

DEPARTMENT OF JUSTICE,
March 31, 1874.

SIR: Your communication of the 10th instant, inclosing a letter of that date to you from the Director of the Mint, wherein he gives an estimate of the value of the German *thaler* and *florin* as expressed in the money of account of the United States, made by him conformably with the rule for the valuation of foreign coin prescribed by the act of March 3, 1873, chap. 268, presents for my consideration the question, "Whether the Secretary of the Treasury is authorized under said act to announce the value of the German *thaler* and *florin* in the money of account of the United States at any time previous to the first of January next, in order that invoices continuing to arrive, expressed in that currency, may be reduced to United States money in accordance with the construction placed upon that act by the Department of Justice and this (the Treasury) Department."

In connection with this inquiry, you state that the proclamation of January 1, 1874, issued by the Secretary of the Treasury pursuant to the provisions of said act, "contains the value of the *mark*, the new monetary unit for the German Empire, but not of the *thaler* and *florin*; while the greater number of German invoices reaching this country continue to be expressed in the *thaler*, which has not yet been superseded in commercial transactions by the *mark*."

The 1st section of the aforesaid act of March 3, 1873, declares "that the value of foreign coin as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value." This enactment, as I have already had occasion to observe in an opinion

Valuation of Foreign Coin.

addressed to you on the 8th of January last, was obviously designed to supersede all the provisions of law previously in force which were passed for the purpose of fixing or ascertaining the rates at which foreign coins should be estimated at the custom-houses in computing duties payable on imported merchandise, but it was designed to supersede those provisions in a specific mode. That mode also appears in the same section, and it consists in this: the Director of the Mint is to estimate annually the "values of the standard coins in circulation of the various nations of the world," and the Secretary of the Treasury is to proclaim such values on the "first day of January." Without some such scheme for authoritatively determining and publishing the values of foreign coins according to the new rule, it is clear that the operation of the latter would be attended with great inconvenience. This measure is one that concerns both public and private interests; and as the latter, especially, are liable to be injuriously affected by any uncertainty to which a departure from the plain letter of the statute may possibly give rise, it seems to me to be essential that the requirements thereof be strictly pursued. Hence, the designation in the statute of a particular time for the performance by the Secretary of the Treasury of the duty of making proclamation, which is thereby devolved upon him, should, I think, be regarded not as directory merely, but as a limitation upon his authority. He is authorized and required to make proclamation at the time indicated, and at no other.

Looking at the matter in that light, I feel constrained to answer the question submitted by you in the negative. With respect to the actual case presented, the conclusion thus reached leads practically to the following result: the value of the thaler and florin, for purposes of computation at the custom-houses, will be that which was established by the laws in force previous to the act of March 3, 1873, until proclamation is made in accordance with the requirements of that act, which cannot now be done until the 1st of next January.

I have the honor to be, very respectfully,

GEO. H. WILLIAMS.

Hon. WM. A. RICHARDSON,

Secretary of the Treasury.

District of Columbia.

COMPENSATION OF DISTRICT ATTORNEY.

Where accounts were presented to the Treasury Department for services rendered by a district attorney during the year 1873, in prosecutions for fines, penalties, and forfeitures for violation of the revenue-laws: *Advised* that they may be paid under the act of March 3, 1873, chap. 244, if the charges therein are deemed just and reasonable by the head of that Department.

DEPARTMENT OF JUSTICE,
April 3, 1874.

SIR: I have the honor to acknowledge the receipt of your letter of the 2d instant, inclosing two accounts presented to your Department by the United States attorney for the district of Vermont, for services rendered by him during the year 1873 in prosecutions for fines, penalties, and forfeitures for violation of the revenue-laws, and requesting my opinion as to whether these accounts may properly be paid under the act of March 3, 1873, chap. 244, (17 Stat., 580.)

From an examination of the accounts mentioned, I am of the opinion that payment thereof may be properly made under the said act, in case the charges therein shall be deemed by you to be just and reasonable.

I return herewith the papers received with your letter.

Very respectfully,

GEO. H. WILLIAMS.

Hon. WM. A. RICHARDSON,
Secretary of the Treasury.

DISTRICT OF COLUMBIA.

Seem that under the 6th section of the act of March 3, 1797, chap. 20, a writ of execution upon a judgment obtained in favor of the United States, issued by a court of the United States in any State, "may run and be executed in" the District of Columbia.

Accordingly, where two such writs were directed to the marshal of said District from the United States circuit court for the western district of Tennessee: *Advised* that it was his duty to execute them.

DEPARTMENT OF JUSTICE,
April 8, 1874.

SIR: I return herewith the papers received with your letter

District of Columbia.

of the 24th ultimo, in which you request instructions as to the service within the District of Columbia of two writs of execution in favor of the United States, directed to you from the United States circuit court for the western district of Tennessee.

Whether the said court has authority to issue final process in any case to run into the District of Columbia depends altogether upon whether such authority has been conferred by any statute of the United States.

The only statutory provision brought to my notice which has any bearing upon the subject, is the 6th section of the act of March 3, 1797, (1 Stat., 515.) That section provides "that all writs of execution upon any judgment obtained for the use of the United States, in any of the courts of the United States in one State, may run and be executed in any other State or in any of the Territories of the United States, but shall be issued from and made returnable to the court where the judgment was obtained, any law to the contrary notwithstanding."

The writs of execution directed to you appear to be writs issued upon judgments obtained for the use of the United States, and thus to come within the terms of description used in the statute. So that the only inquiry really involved here is, whether the statute extends to or includes the District of Columbia. The language there employed is that the writs "may run and be executed in *any other State or in any of the Territories of the United States.*" The law was passed, it will be observed, before the District of Columbia was established, and there can be no doubt that it then included, as it was unquestionably designed to include, every part of the United States; and in an allusion made to the same law in the year 1833 by Judge Barbour, while delivering the opinion of the Supreme Court in *Toland vs. Sprague*, (12 Pet., 328,) he remarked that under it final process in favor of the United States might be served "in any part of the United States;" though if the statute had been enacted after the establishment of the District of Columbia it would not, perhaps, be regarded as including the District under the term "Territories," and whether it would even now be held by the courts to include the District is not free from doubt. But the law

Importation of Household Effects.

being remedial in its nature is to be construed liberally. Its sphere of operation was, originally, co-extensive with the limits of the United States, and was manifestly intended by Congress so to be; and I think it may with propriety be taken to have the like operation throughout the entire bounds of the United States, and accordingly to extend to the District of Columbia, at least until a different interpretation has been judicially placed upon it.

Under all the circumstances it seems to me to be your duty to execute the said writs.

Very respectfully,

GEO. H. WILLIAMS.

ALEX. SHARPE,

United States Marshal, Washington, D. C.

IMPORTATION OF HOUSEHOLD EFFECTS.

The limitation imposed by the 22d section of the act of July 14, 1870, chap. 255, as to the value of "household effects" which are exempted from duty thereunder, ceased to be of force when the provision in the 5th section of the act of June 6, 1872, chap. 315, also exempting such articles from duty, took effect; the provision in the latter act wholly superseding that contained in the former act, relative to the exemption of household effects.

DEPARTMENT OF JUSTICE,
April 15, 1874.

SIR: I have the honor to acknowledge the receipt of your letter of the 4th instant, which presents for my consideration a question that has arisen under the provisions of the customs-laws exempting "household effects" from duty.

By the 23d section of the act of March 2, 1861, (12 Stat., 193-195,) it was provided that from and after the 1st of April, 1861, the importation of the articles thereafter mentioned and embraced in that section should be exempt from duty, among which articles were enumerated the following:

"Household effects, old and in use, of persons or families from foreign countries, if used abroad by them and not intended for any other person or persons, or for sale."

While this provision was in force, Congress, by the 22d section of the act of July 14, 1870, (16 Stat., 265-268,) declared

 Importation of Household Effects.

that after the 31st of December, 1870, in addition to imported articles then by law exempt from duty, and not therein otherwise provided for, the following articles among others should also be free :

“Household effects of persons and families returning or emigrating from foreign countries, which have been in actual use abroad by them, and not intended for any other person or persons, or for sale, *not exceeding the value of five hundred dollars.*”

Subsequently, by the 5th section of the act of June 6, 1872, entitled “An act to reduce duties on imports,” &c., (17 Stat. 233, 234,) it was provided that on and after the 1st day of August, 1872, the importation of the articles enumerated and described in that section should be exempt from duty ; and among the articles therein enumerated and described are the following :

“Books, *household effects*, or libraries, or parts of libraries, in use of persons or families from foreign countries, if used abroad by them not less than one year, and not intended for any other person or persons, nor for sale.”

The question is, whether the limitation imposed by the law of 1870, as to the *value* of household effects exempt from duty thereunder, continues in force still, notwithstanding the above provision of the law of 1872, and applies to importations of such articles by persons or families from foreign countries, made since the date when that provision took effect.

I am of the opinion that the limitation mentioned ceased to have any force at the period when the provision of the act of 1872 took effect, and that consequently it was not thereafter applicable to importations of household effects by persons or families from foreign countries.

In my view, the acts of 1861, 1870, and 1872, where they provide for the exemption of “household effects” from duty, were designed each to regulate that subject *fully and completely* at the time of their enactment respectively ; so that the provision of 1861, relating to such exemption, was entirely superseded by the provision of 1870 relating to the same subject, which in turn was entirely superseded by the similar provision of 1872.

The principle of interpretation upon which this proceeds

Transportation of the Mail.

is, that a statute is impliedly repealed by a later one which revises its *whole subject-matter*, though otherwise it does not appear that there is any actual repugnancy between them. Take as an example of this, in addition to that afforded by the case under consideration, the provisions in the acts of 1870 and 1872 respecting the importation of old books. By the former of these acts "books which have been printed and manufactured more than twenty years" are exempted from duty, (16 Stat., 266;) while the latter exempts from duty "books which shall have been printed and manufactured more than twenty years at the date of importation," (17 Stat., 234.) It cannot reasonably be doubted that the last-mentioned provision was intended as a substitute for or to wholly supersede the first; and yet the repeal here is only a repeal by implication, resting on the application of the principle above stated.

Respecting the importation of household effects by persons or families from foreign countries, the law of 1872 seems to be in substance and effect like the said act of 1861; and I am advised that the construction put upon the latter act by the Treasury Department, and according to which it was administered, required that to bring household effects within the descriptive term "old," employed in that statute, they must have been in actual use abroad by the persons and families owning them for at least one year, which is the period of use abroad required for such articles by the provision of the act of 1872. The act of 1870, though it contained a limitation as to value, did not in terms prescribe any definite period as to use.

I am, sir, very respectfully, your obedient servant,
GEO. H. WILLIAMS.

Hon. WM. A. RICHARDSON,
Secretary of the Treasury.

TRANSPORTATION OF THE MAIL.

A collector of customs is under no disability, by reason of his office, to contract with the Government for carrying the mail in steamboats between two or more ports within the United States.

Transportation of the Mail.

Where the Postmaster-General advertised for proposals for carrying the mail on route number 43132, "from Portland, by Port Townsend and San Juan, to Sitka and back," stating the frequency of the service, &c., as required by section 243 of the act of June 8, 1872, chap. 335; and then, under the same number, added, "Proposals invited to begin at Port Townsend, five hundred miles less:" *Held* that an offer to carry the mail, in response to the latter, cannot be regarded as a bid after due advertisement made, such as would authorize a contract to be awarded thereon; the time and frequency of the service "to begin at Port Townsend" not having been specified in the advertisement.

The law requires due advertisement as well as due proposal, and no amount of precision in the latter can obviate a want of compliance with the law in the former.

DEPARTMENT OF JUSTICE,*April 22, 1874.*

SIR: I have reconsidered the matter of the proposal of Selucius Garfield for carrying the mail between Port Townsend and Sitka, which was referred to me by your letter of the 21th ultimo; and while I remain of the opinion that he is under no disability, by reason of his holding the office of collector of customs, to enter into a contract with the Government for the performance of such service, I am now satisfied that his proposal is not, under the circumstances of the case, entitled to be regarded as a *bid after due advertisement made*, such as would authorize a contract to be awarded thereon. My attention was not called to this point upon the former examination of the case, but I supposed the question in controversy was as to the right of the Postmaster-General to let a contract to carry the mail to a collector of customs.

It appears that in the course of his duty under section 243 of the act of 1872, chap. 335, the Postmaster-General made the following advertisement:

"43132. From Portland, (Oregon,) by Port Townsend (Washington Territory) and San Juan, to Sitka, (Alaska,) fourteen hundred miles and back, once a month, in safe and suitable steamboats.

"Leave Portland 1st of every month, arrive at Sitka by the 10th of every month. Leave Sitka on the 13th of every month, arrive at Portland by the 23d of every month.

"Proposals invited to begin at Port Townsend, (Washington Territory,) five hundred miles less.

Transportation of the Mail.

“Present pay, \$34,800 per annum.”

Section 243 of the act of 1872 requires the Postmaster-General, before making any contract for carrying the mail other than, &c., to give a public notice which “shall describe the route, the time at which the mail is to be made up, the time at which it is to be delivered, and the frequency of the service.”

Section 264 allows him on routes like the above, “whenever the public interest and convenience will thereby be promoted, to contract without advertising.” But this is a case, as I suppose, in which the public interest will not be promoted by the making of a contract without advertising, and I accordingly leave out of view the provisions of this section.

Section 267 of the postal regulations defines those duties of bidders which correspond to the above statutory duties of the Postmaster-General.

Their “regular bid” is to be for a service strictly according to the advertisement; but they are to be at liberty to propose separately for “different service,” which separate proposal will be considered only in case their regular bid is found to be *lower*.

The above case is one in which the Postmaster-General himself invites proposals for a different route from that described 43132; a route probably not different in the sense mentioned in regulation 268, but still in many respects substantially different. Under that number we have a Portland-Sitka route, with service attached as required in the statute cited above. Then we have, by way of addendum, a Port Townsend-Sitka route of an extent less than two-thirds of that of the former, with no service expressly specified.

Supposing an advertisement in the above case to be necessary, I think it must be admitted that the law has not been pursued as to the Port Townsend-Sitka route, at least in one respect, as there seems to be no way of interpreting or construing notice 43132 so as to define a matter which the statute requires to be expressed therein, viz, the times when the mail is to leave one and arrive at the other point. It cannot be done, as I conceive, without applying principles which will entirely defeat the substantial benefits arising from public notice.

Governorship of Arkansas—Case of Baxter and Brooks.

The difficulty here is not so much in the *bid* as in the *advertisement*. The law requires due advertisement as well as due proposal. It is obvious that no amount of precision in the latter can obviate a want of compliance with the law in the former.

I have the honor to be, very respectfully,

GEO. H. WILLIAMS.

Hon. JNO. A. J. CRESWELL,

Postmaster-General.

GOVERNORSHIP OF ARKANSAS—CASE OF BAXTER AND BROOKS.

Where calls are made upon the President, under section 4, Article IV, of the Constitution, by two persons, each claiming to be governor of the same State, to protect the State against domestic violence, it of necessity devolves upon the President to determine, before giving the required aid, which of such persons is the lawful incumbent of the office.

Review of the respective claims of Elisha Baxter and Joseph Brooks—each of whom having made application for Executive aid to suppress an insurrection in Arkansas—to be recognized by the President as governor of that State.

Upon consideration of the constitution and laws of the State, the decisions of its highest judicial tribunal, and the actual determination of the controversy between those parties by the general assembly of the State, which, according to the rulings of the said tribunal, had exclusive jurisdiction of the matter in controversy: *Advised* that Elisha Baxter be recognized by the President as the lawful governor of the State.

DEPARTMENT OF JUSTICE,

May 15, 1874.

SIR: Elisha Baxter, claiming to be governor of Arkansas, having made due application for Executive aid to suppress an insurrection in that State, and Joseph Brooks, claiming also to be governor of said State, having made a similar application, and these applications having been referred by you to me for an opinion as to which of these persons is the lawful executive of the State, I have the honor to submit:

That Baxter and Brooks were candidates for the office of governor at a general election held in Arkansas on the 5th day of November, 1872. Section 19 of Article VI of the constitution of the State provides that "the returns of every election for governor, lieutenant-governor, secretary of state,

Governorship of Arkansas—Case of Baxter and Brooks.

treasurer, auditor, attorney-general, and superintendent of public instruction, shall be sealed up and transmitted to the seat of government by the returning-officers and directed to the presiding officer of the senate, who, during the first week of the session, shall open and publish the same in presence of the members then assembled. The person having the highest number of votes shall be declared elected; but if two or more shall have the highest and equal number of votes for the same office, one of them shall be chosen by a joint vote of both houses. *Contested elections* shall likewise be determined by both houses of the general assembly in such manner as is or may hereafter be prescribed by law."

Pursuant to this section the votes for governor at said election were counted and Baxter was declared to be duly elected.

Said section, as it will be noticed, after providing for a canvass of the votes, specially declares that "*contested elections shall likewise be determined* by both houses of the general assembly in such manner as is or may hereafter be prescribed by law." When this constitution was adopted there was a law in the State, which continues in force, prescribing the mode in which the contest should be conducted before the general assembly, the first section of which is as follows: "*All contested elections of governor shall be decided by the joint vote of both houses of the general assembly, and in such joint meeting the president of the senate shall preside.*" Brooks accordingly presented to the lower house of said assembly his petition for a contest, but, by the decisive vote of sixty-three to nine, it was rejected by that body.

Subsequently the attorney-general, upon the relation of Brooks, applied to the supreme court of the State for a writ of *quo warranto* to try the validity of Baxter's title to the office of governor, in which it was alleged that Baxter was a usurper, &c.; but the court denied the application upon the ground that the courts of the State had no right to hear and determine the question presented, because exclusive jurisdiction in such cases had been conferred upon the general assembly by the constitution and laws of the State.

Brooks then brought a suit against Baxter in the Pulaski circuit court, under section 525 of the Civil Code of Arkansas,

Governorship of Arkansas—Case of Baxter and Brooks.

which reads as follows: "Whenever a person usurps an office or franchise to which he is not entitled by law, an action by proceedings at law may be instituted against him, either by the State or the party entitled to the office or franchise, to prevent the usurper from exercising the office or franchise."

Brooks states in his petition that he received more than 45,000 votes, and that Baxter received less than 30,000 votes, for governor at said election; and after declaring that Baxter has usurped the office, he prays that it may be given to him by the judgment of the court, and that he may recover the sum of \$2,000, the emoluments of said office, withheld from him by Baxter. This presented to the court the simple question of a contest for the office of governor. Baxter demurred to this petition on the ground that the court had no jurisdiction of the case; and afterward, on the 15th of April, the court, in the absence of the defendant's counsel, overruled the demurrer, and without further pleadings or any evidence in the case rendered judgment for Brooks in accordance with the prayer of his petition. Brooks, within a few minutes thereafter, without process to enforce the execution of said judgment, but with the aid of armed men, forcibly ejected Baxter and took possession of the governor's office.

On the next day after the judgment was rendered, Baxter's counsel made a motion to set it aside, alleging, among other things, as grounds therefor, that they were absent when the demurrer was submitted and the final judgment thereon rendered; that the judgment of the court upon overruling the demurrer should have been that the defendant answer, instead of which a final judgment was rendered, without giving any time or opportunity to answer the complaint upon its merits; that the court assessed the damages without any jury or evidence; and finally that the court had no jurisdiction over the subject-matter of the suit. But the next day this motion was overruled by the court.

Section 4, Article IV, of the Constitution of the United States is as follows: "The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and, on application of the legislature, or of the executive, (when the legislature cannot be convened,) against domestic violence."

Governorship of Arkansas—Case of Baxter and Brooks.

When, in pursuance of this provision of the Constitution, the President is called upon by the executive of a State to protect it against domestic violence, it appears to be his duty to give the required aid, especially when there is no doubt about the existence of the domestic violence; but where two persons, each claiming to be governor, make calls respectively upon the President, under said clause of the Constitution, it of course becomes necessary for him to determine in the first place which of said persons is the constitutional governor of the State.

That section of the constitution of Arkansas, heretofore cited, in my opinion is decisive of this question as between Baxter and Brooks. According to the constitution and laws of the State, the votes for governor were counted and Baxter was declared elected, and at once was duly inaugurated as governor of the State. There is great difficulty in holding that he usurped the office into which he was inducted, under these circumstances. Assuming that no greater effect is to be given to the counting of the votes in the presence of the general assembly than ought to be given to a similar action by any board of canvassers, yet, when it comes to decide a question of contest, the general assembly is converted by the constitution into a judicial body, and its judgment upon that question is as final and conclusive as is the judgment of the supreme court of the State upon any matter within its jurisdiction. Parties to such a contest plead and produce evidence according to the practice provided in such cases, and the controversy is invested with the forms and effect of a judicial proceeding. When the people of the State declared in their constitution that a contest about State officers *shall be determined* by the general assembly, they cannot be understood as meaning that it might be determined in any circuit court of the State. To say that a contest shall be *determined* by a decision, and then to say after the decision is made that such contest is not determined, but is as open as it ever was, is a contradiction in terms. Can it possibly be supposed that the framers of this constitution, when they declared that contested elections about State officers, including the governor, should be determined by the general assembly, intended that any such contest should be just as unsettled after as it was

Governorship of Arkansas—Case of Baxter and Brooks.

before such determination of it? Manifestly they intended to create a special tribunal to try claims to the high offices of the State; but the tribunal is not special if the courts have concurrent jurisdiction over the subject. Brooks appears to claim that, when a contest for governor is decided by the general assembly, the defeated party may treat the decision as a nullity and proceed *de novo* in the courts. This makes the constitutional provision as to the contest of no effect, and the proceedings under it an empty form. When the house of representatives dismissed the petition of Brooks for a contest, it must be taken as a decision of that body upon the questions presented in the petition; but it is not of any consequence whether or not the general assembly has, in fact, decided the contest, if the exclusive jurisdiction to do so is vested in that body by the constitution and laws of the State. Section 14 of Article V of the constitution of Arkansas, like most other constitutions, declares that each house of the assembly shall judge of the qualifications, election, and return of its members, and it has never been denied anywhere that these words confer exclusive jurisdiction; but the terms, if possible, are more comprehensive by which the constitution confers upon the legislative assembly jurisdiction to judge of the election of State officers. Doubtless the makers of the constitution considered it unsafe to lodge in the hands of every circuit court of the State the power to revolutionize the executive department at will; and their wisdom is forcibly illustrated by the case under consideration, in which a person who had been installed as governor according to the constitution and laws of the State, after an undisturbed incumbency of more than a year is deposed by a circuit judge, and another person put in his place, upon the unsupported statement of the latter that he had received a majority of the votes at the election.

Looking at the subject in the light of the constitution alone, it appears perfectly clear to my mind that the courts of the State have no right to try a contest about the office of governor, but that exclusive jurisdiction over that question is vested in the general assembly. This view is confirmed by judicial authority. Summing up the whole discussion, the supreme court of Arkansas say, in the case of *The Attorney-General vs.*

Governorship of Arkansas—Case of Baxter and Brooks.

Baxter, above referred to: "Under this constitution the determination of the question as to whether a person exercising the office of governor has been duly elected or not is vested exclusively in the general assembly of the State, and neither this nor any other State court has jurisdiction to try a suit in relation to such contest, be the mode or form what it may; whether at the suit of the attorney-general, or on the relation of a claimant through him, or by an individual alone, claiming a right to the office, such issue should be made before the general assembly. It is their duty to decide, and no other tribunal can determine that question. We are of the opinion that this court has no jurisdiction to hear and determine a writ of *quo warranto* for the purpose of rendering a judgment of ouster against the chief executive of this State, and the right to file an information and issue a writ for that purpose is denied."

Some effort has been made to distinguish this case from that of *Brooks vs. Baxter* in the circuit court, by calling the opinion a dictum; but the point presented to and decided by the supreme court was, that in a contest for the office of governor the jurisdiction of the general assembly was exclusive, which, of course, deprived one court as much as another of the power to try such a contest.

There is, however, another decision made by the same court upon the precise question presented in the case of *Brooks vs. Baxter*. Berry was a candidate for State auditor on the same ticket with Brooks. Wheeler, his competitor, was declared elected by the general assembly. Berry then brought a suit under said section 525, in the Pulaski circuit court, to recover the office. Wheeler applied to the supreme court for an order to restrain the proceedings, and that court issued a writ of prohibition, forbidding the said court to proceed, on the ground that it had no jurisdiction in the case. As to the questions of law involved, the cases of Berry and Brooks are exactly alike. That this circuit court should have rendered a judgment for Brooks under these circumstances is surprising, and it is not too much to say that it presents a case of judicial insubordination which deserves the reprehension of every one who does not wish to see public confidence

 Governorship of Arkansas—Case of Baxter and Brooks.

in the certainty and good faith of judicial proceedings wholly destroyed.

Chief-Justice McClure, who dissented in the case of *The Attorney-General vs. Baxter*, delivered the opinion of the court in the Wheeler case, in which he uses the following language: "The majority of the court in the case of *The State vs. Baxter*, under the delusion that *quo warranto* and a contested-election proceeding were convertible remedies, having one and the same object, decides that *neither this nor any other* State court, no matter what the form of action, had jurisdiction to try a suit in relation to a *contest* for the office of governor. As an abstract proposition of law I concede the correctness of the rule, and would have assented to it if the question had been before us. The question now before this court is precisely one of contest and nothing else." "As to all matters of *contested election* for the offices of governor, lieutenant-governor, secretary of state, auditor, treasurer, attorney-general, and superintendent of public instruction, I am of opinion that it can only be had before the general assembly." He then adds, in conclusion: "I think a writ of prohibition ought to go to prohibit the circuit court from entertaining jurisdiction of that portion of *Berry vs. Wheeler* that has for its object a recovery of the office."

All five of the judges heard this case, and there was no dissent from these views as to the question of jurisdiction.

To show how the foregoing decisions are understood in the State, I refer to a note by the Hon. H. C. Caldwell, judge of the district court of the United States for the eastern district of Arkansas, upon section 2379 of a Digest of the Statutes of the State, lately examined and approved by him, which is as follows: "By the provisions of section 19 of Article VI of the constitution the jurisdiction of the general assembly over cases of contested election for the offices in said section enumerated is exclusive." (*Attorney-General on the relation of Brooks vs. Baxter*, Ms. Opin., 1873; *Wheeler vs. Whytock*, Ms. Opin., 1873.)

It is assumed in the argument for Brooks that the judgment of the Pulaski circuit court is binding as well upon the President as upon Baxter until it is reversed; but where there are conflicting decisions, as in this case, the President

Governorship of Arkansas—Case of Baxter and Brooks.

is to prefer that one which, in his opinion, is warranted by the constitution and laws of the State.

The general assembly has decided that Baxter was elected. The circuit court of Pulaski County has decided that Brooks was elected. Taking the provision of the constitution which declares that *contested elections* about certain State officers, including the governor, *shall be determined* by the general assembly, and that provision of the law heretofore cited which says that *all contested elections of governor shall be decided* by the legislature, and the two decisions of the supreme court affirming the exclusive jurisdiction of that body over the subject, and the conclusion irresistibly follows that said judgment of the circuit court is void. A void judgment binds nobody. Said section 525, under which this judgment was rendered, must be construed with reference to the constitution and also to other statutes of the State, and is no doubt intended to apply to county and other inferior officers for which no provision elsewhere is made; but the constitution takes the State officers therein enumerated out of the purview of this section, and establishes a special tribunal to try those contested-election cases to which they are parties. The jurisdiction of this tribunal is exclusive. (*Ohio vs. Grisell & Menton*, 15 Ohio, 114; *Attorney-General vs. Garrigues*, 28 Penn., 9; *Com. vs. Baxter*, 35 *ibid.*, 263; *Com. vs. Leech*, 44 *ibid.*, 332.)

Respecting the claim that Brooks received a majority of the votes at the election, it must be said that the President has no way to verify that claim. If he had, it would not, in my opinion, under the circumstances of this case, be a proper subject for his consideration. Perhaps if everything about the election was in confusion and there had been no legal count of the votes, the question of majorities might form an element of the discussion; but where, as in this case, there has been a legal count of the votes and the tribunal organized by the constitution of the State for that purpose has declared the election, the President, in my judgment, ought not to go behind that action to look into the state of the vote. Frauds may have been committed to the prejudice of Brooks; but, unhappily, there are few elections, where partisan zeal runs high, in which the victorious party, with more or less of truth, is not charged with acts of fraud. There must, however, be an end to controversy upon the subject. Some-

Governorship of Arkansas—Case of Baxter and Brooks.

body must be trusted to count votes and declare elections. Unconstitutional methods of filling offices cannot be resorted to because there is some real or imagined unfairness about the election. Ambitious and selfish aspirants for office generally create the disturbance about this matter, for people are more interested in the preservation of peace than in the political fortunes of any man.

Either of the contestants, with law and order, is better than the other, with discord and violence. I think it would be disastrous to allow the proceedings by which Brooks obtained possession of the office to be drawn into precedent. There is not a State in the Union in which they would not produce conflict, and probably bloodshed. They cannot be upheld or justified upon any ground; and in my opinion Elisha Baxter should be recognized as the lawful executive of the State of Arkansas.

Since the foregoing was written I have received a telegraphic copy of what purports to be a decision of the supreme court of Arkansas, delivered on the 7th instant, from which it appears that the auditor of the State, upon the requisition of Brooks, drew his warrant on the treasurer for the sum of one thousand dollars, payment of which was refused. Brooks then applied to the supreme court for a writ of *mandamus* upon the treasurer, who set up, by way of defense, that Brooks was not governor of the State, to which Brooks demurred; and thereupon the court say, "The only question that we deem it necessary to notice is, did the circuit court have jurisdiction to render the judgment in the case of *Brooks vs. Baxter*? We feel some delicacy about expressing an opinion upon the question propounded; but under the pleadings it has to be passed upon incidentally, if not absolutely, in determining whether the relator is entitled to the relief asked; for his right to the office, if established at all, is established by the judgment of the circuit court of Pulaski County. We are of opinion the circuit court had jurisdiction of the subject-matter, and its judgment appears to be regular and valid. Having arrived at these conclusions, the demurrer is overruled and the writ of *mandamus* will be awarded as prayed for."

To show the value of this decision it is proper that I should make the following statement: On the 20th of April Brooks made a formal application to the President for aid to suppress

Governorship of Arkansas—Case of Baxter and Brooks.

domestic violence, which was accompanied by a paper signed by Chief-Justice McClure and Justices Searle and Stephenson, in which they stated that they recognized Brooks as governor; and to this paper also is appended the name of Page, the respondent in the above-named proceedings for *mandamus*. Page, therefore, did not refuse to pay the warrant of the auditor because he did not recognize Brooks as governor, but the object of his refusal evidently was to create such facts as were necessary to make a case for the supreme court. Accordingly, the pleadings were made up by the parties, both of whom were on the same side in the controversy, and the issue so made was submitted to judges virtually pledged to give the decision wanted; and there, within the military encampment of Brooks, they hurriedly, but with delicacy, as they say, decided that he is governor—a decision in plain contravention of the constitution and laws of the State, and in direct conflict with two other recent decisions of the same court deliberately made. I refrain from comment.

More than once the Supreme Court of the United States has decided that it would not hear argument upon a case made up in this way, and a decision obtained under such circumstances is not recognized as authority by any respectable tribunal. No doubt this decision will add to the complications and difficulties of the situation, but it does not affect my judgment as to the right of Baxter to the office of governor until it is otherwise decided, upon contest made, by the legislature of the State.

On the 11th instant the general assembly of the State was convened in extra session upon the call of Baxter, and both houses passed a joint resolution, pursuant to section 4 of Article IV of the Constitution of the United States, calling upon the President to protect the State against domestic violence. This call exhausts all the means which the people of the State have under the Constitution to invoke the aid of the Executive of the United States for their protection, and there seems to be, under the circumstances of the case, an imperative necessity for immediate action.

I have the honor to be, with great respect,

GEO. H. WILLIAMS.

The PRESIDENT.

Introduction of Spirituous Liquors or Wines in Alaska.

INTRODUCTION OF SPIRITUOUS LIQUORS OR WINES IN ALASKA.

By virtue of the acts of February 13, 1862, chap. 24; March 15, 1864, chap. 33; and March 3, 1873, chap. 227, the War Department is clothed with a discretionary authority over the introduction of spirituous liquors or wines into the Territory of Alaska, and may permit such articles to be taken there, whether they are or are not intended for the use of officers or troops in the service of the United States.

The first of these acts, though in form an amendment, is really a substitute for the whole of section 20 of the act of June 30, 1834, chap. 161, and nothing of said section not contained in that act is left in force.

DEPARTMENT OF JUSTICE,*June 3, 1874.*

SIR: I have the honor to acknowledge the receipt of your letter of the 30th ultimo, in which you submit for my official opinion the following question: "Has this Department authority to permit the introduction of spirituous liquors or wines into the Territory of Alaska when the liquors and wines are not for the use of officers of the United States or troops of the service?"

Section 20 of the act of June 30, 1834, (4 Stat., 732,) imposed a penalty upon any person who should sell, exchange, or give, barter, or dispose of, any spirituous liquors or wines to an Indian, (in the Indian country,) or who should introduce or attempt to introduce any spirituous liquors or wines into the Indian country, except such supplies as shall be necessary for the officers of the United States and troops of the service, under the direction of the War Department.

By the act of February 13, 1862, (12 Stat., 339,) this section was amended so as to read as follows: "That if any person shall sell, exchange, give, barter, or dispose of any spirituous liquor or wines to any Indian under the charge of any Indian superintendent or Indian agent appointed by the United States, or shall introduce or attempt to introduce any spirituous liquor or wine into the Indian country, such person, on conviction thereof before the proper district court of the United States, shall be imprisoned for a period not exceeding two years, and shall be fined not more than three hundred dollars: *Provided, however,* That it shall be a sufficient defense to any charge of introducing or attempting to intro-

Citizenship.

duce liquor into the Indian country, if it be proved to be done by order of the War Department or of any officer duly authorized thereto by the War Department," &c.

This act, though in the form of an amendment, is a substitute for the whole of section 20 of the act of 1834, and nothing of said section not contained in said act is left in force. The only way to read said section is as provided in said act. According to said section 20, as it originally stood, "no liquor or wine could be lawfully introduced into the Indian country, except such supplies as shall be necessary for the officers of the United States and troops of the service, under the direction of the War Department;" but in the act of 1862 this phraseology is changed, and it is provided "that it shall be a sufficient defense to any charge of introducing or attempting to introduce liquor into the Indian country, if it be proved to be done by order of the War Department or of any officer authorized thereto by the War Department."

I think the object and effect of this change were to invest the War Department with a jurisdiction over the introduction of spirituous liquors or wine into the Indian country, to be exercised at its discretion. The said act of February 13, 1862, was re-enacted, with some not material alterations, by the act of March 15, 1864, (13 Stat., 29;) and by the act of March 3, 1873, (17 Stat., 530,) was made applicable to the Territory of Alaska.

I therefore return an affirmative answer to your question.

Very respectfully,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,
Secretary of War.

CITIZENSHIP.

Authorities upon the construction of the 2d section of the act of February 10, 1855, chap. 71, reviewed, and the following conclusion deduced therefrom, viz, that any free white woman, not an alien enemy, who is married to a citizen of the United States, is, by reason of her marriage, to be deemed a citizen of the United States, irrespective of the time or place of the marriage or the residence of the parties.

Citizenship.

Held, accordingly, that an alien woman who has intermarried with a citizen of the United States residing abroad—the marriage having been solemnized abroad, and the parties after the marriage continuing to reside abroad—is to be regarded as a citizen of the United States, within the meaning of said act, though she may never have resided in the United States.

DEPARTMENT OF JUSTICE,

June 4, 1874.

SIR: I have the honor to acknowledge the receipt of your letter of the 27th ultimo, in which, after referring to the act of Congress approved February 10, 1855, (10 Stat., 604,) you submit for my official opinion the following questions:

“1st. Does the marriage of an alien woman to a citizen of the United States, the woman being resident in, and the marriage being solemnized in, the United States, constitute her a citizen *per se*? or must she have previously resided in the United States a sufficient length of time to entitle her lawfully to be naturalized under existing laws?”

“2d. Is an alien woman who has never resided in the United States, but who intermarries with a citizen of the United States resident in a foreign country, the marriage being solemnized in such foreign country, and the parties continuing to reside abroad after marriage, to be deemed and taken to be a citizen of the United States within the meaning of the act of 1855?”

Section 2 of said act provides “that any woman who might lawfully be naturalized under the existing laws, married, or who shall be married, to a citizen of the United States, shall be deemed and taken to be a citizen.”

This section has been the subject of judicial construction in several cases.

Brady, J., in the case of *Burton vs. Burton*, (How. Pr. Rep., vol. 26, p. 474,) gives it as his opinion that the act of 1855 was designed “for the benefit of an alien white woman, whether resident or not, married to a person who was, at the time of the marriage, a citizen of the United States; thus securing, by the same law, the rights of citizenship to the children of American citizens born abroad, and to such alien wife all legal rights of citizenship which otherwise, and by reason of her alienism, she might not possess.”

Kane vs. McCarthy et al. (N. C. Rep., vol. 63, p. 299,) was a

Citizenship.

case in which it appears that Thomas Kane, a native of Ireland, emigrated to the United States in September, 1848, and was duly naturalized on the 18th of October, 1855; that he returned to Ireland in 1857, and there married his wife, Martha, and afterward continued to reside in Ireland with the intention of returning to this country. John Kane, a brother of the said Martha and a citizen of the United States, died on the 20th of May, 1863, seized of certain real estate. Said Martha claimed said real estate as the heir of said John Kane. McCarthy and his wife also claimed said real estate upon the ground that Mary, the wife of the said McCarthy, was also the sister of John Kane; that she and her husband were both natives of Ireland; that she married said McCarthy in May, 1851, in New Jersey, and that he was naturalized in October, 1856. Pearson, C. J., delivering the opinion of the court, held that the real estate was to be equally divided between the said Martha and the said Mary, notwithstanding the said Martha had not since her marriage resided in the United States, and notwithstanding that McCarthy, the husband of the said Mary, was not a citizen of the United States at the time of her marriage to him. He said, "Martha Kane is a white woman, a native of Ireland, and was not an alien enemy; therefore, she might lawfully have been naturalized under the existing laws, and answers the description required by the section under consideration. She was married to a citizen of the United States when the descent was cast, and was then herself a citizen of the United States by force of the act of 1855, and takes as one of the heirs of her brother." Referring to the said Mary, he says, "The circumstance that her husband was not a citizen at the time of marriage is wholly immaterial, for he became a citizen afterward *ipso facto*. So she, being a free white woman married to a citizen, comes within the description and the very words of the act of Congress, and is deemed and taken to be a citizen; for it is the status of being married to—being the wife of—a citizen that makes her one. It can in no possible view make any difference whether the marriage ceremony is performed first and then the husband becomes a citizen, or whether he becomes a citizen first and the marriage afterward

Citizenship.

takes place; whenever the two events concur and come together she is a woman married to a citizen."

Kelly vs. Owen et al. (7 Wall., 496) was a case in which it appeared that one Miles Kelly, a native of Ireland, emigrated to the United States in 1848. In January, 1853, he married Ellen Duffy, and in May, 1855, was naturalized. He died in the city of Washington in 1862, intestate, seized of certain real property, and leaving to survive him in the United States the said Ellen, his widow, and two sisters, Ellen Owen and Margaret Kahoe, both of whom were natives of Ireland. The sister, Ellen Owen, arrived in 1856, and was married to Edward Owen in 1861, who was naturalized in 1835. The sister, Margaret Kahoe, arrived in the United States in 1850, and was married to James Kahoe in 1862, who was naturalized in 1854. Justice Field, delivering the opinion of the court, stated that the case turned upon the construction given to the 2d section of the act of Congress of February 10, 1855, and then said:

"As we construe this act, it confers the privilege of citizenship upon women married to citizens of the United States, if they are of the class of persons for whose naturalization the previous acts of Congress provide. The terms 'married' or 'who shall be married,' do not refer, in our judgment, to the time when the ceremony of marriage is celebrated, but to a state of marriage. They mean that whenever a woman, who under previous acts might be naturalized, is in a state of marriage to a citizen, whether his citizenship existed at the passage of the act, or subsequently, or before or after the marriage, she becomes by that fact a citizen also. His citizenship, whenever it exists, confers under the act citizenship upon her. The construction which would restrict the act to women whose husbands at the time of marriage are citizens would exclude far the greater number for whose benefit, as we think, the act was intended. Its object, in our opinion, was to allow her citizenship to follow that of her husband, without the necessity of any application for naturalization on her part, and, if this was the object, there is no reason for the restriction suggested.

"The terms 'who might lawfully be naturalized under the existing laws' only limit the application of the law to free

Representatives-Elect-Compensation.

white women. The previous naturalization-act existing at the time only required that the person applying for its benefits should be 'a free white person and not an alien enemy.'"

It was decided in this case that the widow and the two sisters were citizens of the United States at the death of the intestate.

These authorities appear to settle the question, and go to the extent of holding that, irrespective of the time or place of marriage or the residence of the parties, any free white woman, not an alien enemy, married to a citizen of this country, is to be taken and deemed a citizen of the United States.

Very respectfully,

GEO. H. WILLIAMS.

Hon. HAMILTON FISH,
Secretary of State.

REPRESENTATIVES-ELECT-COMPENSATION.

H., while acting as counsel of the United States before the joint commission between the United States and Great Britain, under an appointment by the President, was elected a Representative to the Forty-third Congress, the term whereof began on the 4th of March, 1873. On the 3d of March, 1873, an act was passed authorizing the President to continue him in his employment as such counsel, notwithstanding his election as aforesaid, until he should take the oath of office as a Representative in Congress. H. took the oath of office as a Representative December 1, 1873, up to which date he was continued in employment as counsel, and he received compensation for his services as such for the period between that date and the 4th of March, 1873. Question being raised whether he is entitled to receive also the salary of a member of Congress for the same period: *Held* that he is so entitled—that he is not affected by the prohibition contained in the 1st section of the act of September 30, 1850, chap. 90, against paying to one individual the salaries of two different offices.

A Representative-elect does not become a member of the House, within the meaning of section 6, Article I, of the Constitution, until he is sworn in as such; and hence he may, till then, lawfully hold office under the United States.

DEPARTMENT OF JUSTICE,

June 6, 1874.

SIR: On the 21st ultimo I received from the late Secretary of the Treasury a communication asking for my opinion as to

Representatives-Elect-Compensation.

"whether Hon. Robert S. Hale, late agent and counsel of the United States before the joint commission of the United States and Great Britain, organized under the provisions of the twelfth article of the treaty of Washington, who was paid a salary at the rate of \$10,000 per annum, and also his expenses, for the period between March 3 and December 1, 1873, is also entitled to the salary of a member of Congress during the same period, he having been elected to the Forty-third Congress."

Mr. Hale was employed by the President as said agent or counsel in July or August, 1871. November, 1872, he was elected to the Forty-third Congress. March 3, 1873, (17 Stat., 598,) Congress passed an act as follows:

"That it shall be lawful for the President of the United States, in his discretion, to continue the appointment and employment of the present agent and counsel of the United States, under articles twelve to seventeen, inclusive, of the treaty between the United States and Great Britain, concluded May 8, 1871, and for said agent and counsel to act under such continued appointment and employment, notwithstanding the election of the said agent and counsel as a Representative in the Forty-third Congress: *Provided*, That such appointment and employment shall not continue after said agent and counsel shall have taken the oath of office as such Representative."

The President, by virtue of this act, continued Mr. Hale's appointment until December 1, 1873, when he took the oath of office as a Representative in Congress.

Section 1 of the act of April 21, 1808, (2 Stat., 481,) made it criminal for any member of Congress to undertake, hold, or enjoy any contract or agreement made with any officer of the United States on their behalf, and I presume that the above-named act of 1873 was intended to repeal said act of 1808, so far as the same was applicable to the employment of Mr. Hale.

The inquiry in this case is supposed to arise upon the proviso in section 1 of the act of September 30, 1850, (9 Stat., 542,) which is as follows:

"That hereafter the proper accounting-officers of the Treasury, or other pay-officers of the United States, shall in

Representatives-Elect-Compensation.

no case allow and pay to one individual the salaries of two different offices on account of having performed the duties thereof at the same time. But this prohibition shall not extend to the superintendents of the executive buildings."

The proviso has been construed by the Supreme Court of the United States in the case of *Converse vs. The United States*, (21 How., 463,) and Mr. Attorney-General Black says, (9 Opin., 508,) according to this decision "a person holding two compatible offices or employments under the Government is not precluded from receiving the salaries of both by anything in the general laws prohibiting double compensation."

Whether Mr. Hale's said agency was an ordinary professional employment or an office is, perhaps, questionable; but if the act of 1873 was passed for the purpose above suggested, Congress must have regarded it as a contract with, and not an office under, the Government. Assuming it, however, to be an office, there is no incompatibility between it and an election to Congress; or if such incompatibility would otherwise exist, it has been removed by said act of 1873; for it is clear that said act contemplates that Mr. Hale shall hold both under his election and appointment until he takes the oath of office as a Representative in Congress.

Section 6 of Article I of the Constitution provides that "no person holding any office under the United States shall be a member of either House during his continuance in office;" but a Representative in Congress, in my opinion, does not become a member of the House until he takes the oath of office as such Representative; therefore he may lawfully hold any office from his election until that time.

A person elected to Congress has no duties to perform, nor can he draw any salary before he is sworn into office. When he takes the oath he becomes entitled to pay from the beginning of the Congress to which he is elected, but is not regarded as in the office prior to that time for any purpose.

I think it would be a fair construction of said act of 1873 to hold that it was intended to give Mr. Hale the privilege of continuing as the agent or counsel of the Government before said mixed commission until he took the oath as Representative in Congress, without depriving him of any right or privilege resulting to him from his election as such Rep-

New State, War, and Navy Department Building.

representative. Doubts may well be entertained as to whether said act of 1850 applies at all to a member of Congress, as his position is not generally embraced in the term "office" as used in the statutes of the United States regulating the administrative affairs of the Government; but I am clear that it does not apply to a Representative-elect before he takes the oath of office, and accordingly I am of the opinion that Mr. Hale, in addition to his pay as counsel or agent for the United States before said commission, is entitled to his salary as Representative in the Forty-third Congress.

Very respectfully,

GEO. H. WILLIAMS.

Hon. B. H. BRISTOW,

Secretary of the Treasury.

NEW STATE, WAR, AND NAVY DEPARTMENT BUILDING.

The direction of the entire work on the new State, War, and Navy Department building, and the disbursement of the appropriations provided therefor, are by law devolved upon the Secretary of State.

DEPARTMENT OF JUSTICE,

July 3, 1874.

SIR: I have considered the question relating to the construction of the new State, War, and Navy Department building, which was submitted to me in your communication of the 27th ultimo, namely, "Whether or not the Secretary of State is charged by law with the direction of the whole of the building in question, or is such direction of the Secretary of State limited to that portion of the building designed for the use of the Department of State and designated as the south wing?"

In connection with this subject you observe that the south wing of the building is rapidly approaching completion; that under the appropriation made by the recent act of June 23, 1874, the construction of the east and north wings of the building will be continued; and that it is important that the question of who is charged with the direction of such construction and the disbursement of the funds appropriated for that purpose should be definitely ascertained.

New State, War, and Navy Department Building.

It appears that the first provision for the erection of the building mentioned was made by the 2d section of the act of March 3, 1871, (16 Stat., 494.) By that section Congress appropriated five hundred thousand dollars "for the construction, under the direction of the Secretary of State, of a building which will form the south wing of a building that, when completed, will be similar in the ground-plan and dimension to the Treasury building," &c. This appropriation, as it seems, was restricted to the south wing; and the construction of that part of the building, including also the disbursement of the fund provided therefor, was clearly to be done under the direction of the Secretary of State. Next, an appropriation of two hundred thousand dollars was made by the act of May 18, 1872, (17 Stat., 126,) for continuing the same work "during the balance of the (then) present fiscal year;" and that was followed by an appropriation of eight hundred thousand dollars for the continuation of the same work, made by the act of June 10, 1872, (17 Stat., 352.)

Previous to the date of the latter act no provision had been made for the erection of any other part of the building than the south wing. But by that act an appropriation of four hundred thousand dollars was made for the east wing; and this appropriation, and also the aforesaid appropriation of eight hundred thousand dollars, made by the same act, are each placed in the statute under the heading, "Public works under the Treasury Department." Then, by the act of March 3, 1873, (17 Stat., 528,) an appropriation of one million five hundred thousand dollars was made for "continuing the work on the new State, War, and Navy Department building." This last appropriation was applicable to both the south and the east wings of the building, and it is found in the statute under a heading which reads, "Under the Treasury Department." The classification of the appropriations made for said building by the acts of 1872 and 1873, under the headings referred to, certainly affords some ground for the inference that the construction of the building, together with the disbursement of such appropriations, belonged by law to the Treasury Department. Yet that inference is met, and in my opinion entirely overcome, by other statutory provisions and circumstances, favoring a different view. It has already been shown

New State, War, and Navy Department Building.

that at the commencement of the building, which was begun by erecting the south wing, the work was placed by statute under the direction of the Secretary of State. No law has since expressly taken the work from under his direction, or expressly put it under the direction of any one else. On the contrary it has, up to the present time, actually remained under his direction, with the knowledge and apparent sanction and approval of Congress; since all appropriations therefor, subsequent to the first, have thus far been made by that body on estimates furnished by him. Furthermore, all of the appropriations therefor have, up to the present time, been disbursed by the State Department with the approbation of Congress, as is evident from the provision in the act of March 3, 1873, (17 Stat., 531,) making an appropriation "to pay the disbursing-clerk of the Department of State additional compensation for disbursing moneys appropriated for the building now being erected for the use of the War, State, and Navy Departments, from the commencement of such duties until the 30th of June, 1874." Besides, the act of March 3, 1873, first above mentioned, contains a provision which seems to imply that the construction of the building just described is not under the Treasury Department. Thus it provides (17 Stat., 524,) that the sums thereby "appropriated for the construction of public buildings, under the Treasury Department, including the building for the new State, War, and Navy Departments, shall be available immediately upon the approval of this act." If, at the time of this enactment, the building in question was already "under the Treasury Department," the insertion of a clause therein specially including it was unnecessary. The presence of such clause indicates that Congress did not regard that building as one whose construction was then under the Treasury Department.

The conclusion I draw from the various statutory provisions above referred to, and the circumstances mentioned in connection therewith, is, that the Secretary of State has up to the present time been charged with the direction of the construction of the entire building for the State, War, and Navy Departments, and also the disbursement of the appropriations heretofore made therefor; and I am of opinion that the act of June 23, 1874, providing an appropriation for the contin-

Authority of Accounting-Officers.

ance of the construction of the same building, makes no change either in regard to the direction of the work or the disbursement of the fund provided for the same. These remain, as heretofore, under the charge of the Secretary of State.

I have the honor to be, very respectfully,

GEO. H. WILLIAMS.

Hon. HAMILTON FISH,
Secretary of State.

AUTHORITY OF ACCOUNTING-OFFICERS.

A settlement was made by the accounting-officers of the Treasury with F., as assignee of certain parties, for the use and occupation of some buildings by the military authorities, whereupon he was paid the amount allowed. Subsequently another settlement was made with him, as assignee of certain other parties, for the use and occupation of other buildings by the same authorities, wherein, it having in the mean time been ascertained that the allowance on the first settlement was improper, and made in ignorance of a fact which, had the accounting-officers been cognizant thereof at the time, would have precluded such allowance, the amount paid as aforesaid was deducted, and only the balance remaining after the deduction allowed: *Held* that, notwithstanding the claims originally belonged to and were derived by assignment from different persons, it was competent to the accounting-officers, under the circumstances, to make a deduction in the last settlement of what had been improperly allowed and paid on the first.

DEPARTMENT OF JUSTICE,

July 10, 1874.

SIR: In a letter dated the 24th of April last, the Hon. F. A. Sawyer, then Acting Secretary of the Treasury, submitted for my opinion a question which has arisen in connection with the settlement of certain claims by the accounting-officers of the Treasury in favor of Hamilton G. Fant.

The facts of the case appear to be, in substance, these: In August, 1870, a settlement was made with Mr. Fant, as assignee of certain parties, for the use and occupation by the military authorities of the United States, during the late war, of certain buildings at Point Lookout, Md., in which settlement he was allowed and paid the sum of \$1,637.52. In October, 1871, another settlement was made with him, as

Authority of Accounting-Officers.

assignee of certain other parties, for the use and occupation by the same authorities, during the same period, of certain other buildings at the same place. But before the consummation of this last settlement, and subsequent to the first settlement, it had come to the knowledge of the Second Comptroller of the Treasury that the assignors of the claims embraced in the first settlement resided in one of the insurrectionary States during the war; and that officer, in view of the fact just mentioned, deeming the allowance of such claims to have been improper, directed the amount paid to Mr. Fant on the first settlement to be deducted from the amount that might be found due him on the second settlement, which was accordingly done. After making this deduction, a balance of \$268.32 still remained in his favor on the latter settlement, and that balance has been paid.

In this matter the Comptroller seems to have based his action on the consideration that the settlement of those claims which were originally owned by persons living in an insurrectionary State were unauthorized by law; that the assignee of such persons, in prosecuting such claims, stood in no better situation than their assignors would have stood had no assignment been made; and the deduction of the amount improperly allowed as aforesaid, so the Comptroller states, "was done in conformity with the rule in such cases."

The question submitted is, whether or not, after the settlement with and payment to Mr. Fant, in 1870, as assignee of certain parties, it was competent to the accounting-officers to make a deduction in the subsequent settlement with him in 1871, as assignee of certain other parties, by reason of "any error in payment of the claims of the first assignors in 1870."

It may fairly be inferred from the facts of the case as stated that the *first* settlement with Mr. Fant was made under a misapprehension, or rather in ignorance, of a fact which, had it been made known to the accounting-officers at the time, would have precluded any allowance in his favor on account of the claims covered by that settlement. Looking at the matter in this aspect, and also taking into view the circumstance that the allowance made in that settlement was erroneous by reason of the existence of the fact referred to, I am unable to perceive why those officers, on subsequently obtaining informa-

National Banks.

tion of such fact, could not correct the error they had previously committed in the mode actually adopted by them. That error, as it seems, did not proceed from a mistake on their part respecting any matter of law pertaining to the claims mentioned, but from the want of information respecting a matter of fact which vitally affected the claims, and which it was of the utmost importance for those officers to possess.

As the party in whose name both of the settlements were made is one and the same individual, and as he was also the *sole party in interest* in the claims embraced in those settlements when they were made, I am of opinion that notwithstanding the claims originally belonged to and were derived by assignment from different persons, it was competent to the accounting-officers, under the circumstances, to make a deduction in the settlement of 1871 of what had been improperly allowed and paid on the settlement of 1870. I express no opinion upon any other question raised before me in reference to this case, because no other question than the one above decided has been submitted for my opinion.

Very respectfully,

GEO. H. WILLIAMS.

Hon. B. H. BRISTOW,

Secretary of the Treasury.

NATIONAL BANKS.

Provisions of the acts of March 3, 1865, chap. 82; July 12, 1870, chap. 252; and June 20, 1874, chap. 343, examined and considered with reference to the power and duty of the Comptroller of the Currency concerning the distribution of circulating-notes authorized by the national banking-laws. The Comptroller may, consistently with the last-mentioned act, distribute under the act of 1865 such portion as remains unissued of the \$300,000,000 authorized by the national-bank act of June 3, 1864, chap. 106, and under the act of 1870 such portion of the \$54,000,000 authorized thereby as remains unissued.

In the distribution of the \$55,000,000, for which provision is made by the act of 1874, it is the duty of the Comptroller, upon applications duly made, to satisfy the same with reasonable expedition, even to the extent of giving to a State its full apportionment; but of several applications made about the same time, if some are from a State or Territory where the deficiency is relatively great, and others from a State or Territory where it is relatively small, preference should be given to the former in case the supply is not sufficient for all.

National Banks.

The means of supplying the said \$55,000,000 provided by the act of 1874 is by requisitions upon the national banks in States having an excess of circulation; and the Comptroller can resort to no other sources of supply.

National banks with a capital of \$50,000 may (notwithstanding the *proviso* in the 4th section of the act of 1874) still be organized, as heretofore, upon a deposit of \$30,000 in bonds, and those with a capital of not less than \$150,000 upon a deposit of one-third of their capital stock in bonds.

DEPARTMENT OF JUSTICE,

July 15, 1874.

SIR: I have had under consideration the questions relative to the operation of the act of Congress of June 20, 1874, submitted by the Comptroller of the Currency in his letter to you of July 8, 1874, and referred to me by your letter of the same date, which was received July 9, 1874; and I have the honor to return herewith the following answers:

The Comptroller cites in his letter the "national-bank act," which authorized the issue of \$300,000,000 of circulating-notes; the amendatory act of March 3, 1865, apportioning that circulation; also the act of July 12, 1870, which authorized the issue of \$54,000,000 additional of circulating-notes, to be distributed among States having less than their proportion of the circulation under the apportionment of March 3, 1865. He then cites from the act of June 20, 1874, the provision requiring the withdrawal of \$55,000,000 from States having an excess of notes above their proportion under the apportionments, and quotes the provision requiring him to issue circulating-notes, not to exceed the sum of \$55,000,000, to banking associations in the States and Territories having less than their proportion of circulation, and also the proviso that the amount withdrawn and redeemed shall not exceed \$55,000,000, to be withdrawn and redeemed as shall be necessary to supply the circulation previously issued under the provision next above quoted.

He then states as matter of fact that there is a residue which has never been issued of the \$354,000,000 of notes authorized by the "national-bank act," and by the act of July 12, 1870; and he states further that there will speedily be returned to the Treasury for redemption and destruction, under the law, a considerable amount by banks which have ceased to do business.

National Banks.

The Comptroller then asks whether it is lawful to distribute the residue above mentioned and also whatever amount may be redeemed and destroyed of the circulation of banks that have gone or are going into liquidation.

In my opinion it is lawful to issue and distribute under the apportionment contemplated by the act of March 3, 1865, such portion as may remain unissued of the \$300,000,000 of circulating-notes authorized by the "national-bank act," and under the apportionment of the act of July 12, 1870, the portion remaining unissued of the \$54,000,000 authorized by that act; and whatever other resource the Comptroller had under the law previous to the passage of the act of June 20, 1874, to supply any legal application for circulating-notes, he still retains. For the act of June 20, 1874, does not repeal expressly (except in one particular, to which I shall presently advert) any previous legislation; and repeals by implication are not favored unless there is a plain, direct, and irreconcilable repugnancy between the latter and the former statute. But the powers given to the Comptroller of the Currency by the several acts of Congress to issue and distribute circulating-notes may well subsist together.

The 1st and 6th sections of the act of July 12, 1870, were enacted to remedy the inequality of circulation, in the States and Territories, which had grown up or been permitted under the act of March 3, 1865. The plain intent of the 7th and 9th sections of the act of June 20, 1874, is still further "to secure a more equitable distribution of the national-banking currency" by transferring, to the extent of \$55,000,000, notes now in circulation from banking associations "transacting business" in States having an excess of circulation, to States and Territories where there are deficiencies.

The act supposes a demand, and indicates clearly the means of supply, to wit, requisitions upon each of the national banks described in section 6 of the act of July 12, 1870. It is made the imperative duty of the Comptroller to make these requisitions, and it would seem that he is cut off from other means of supplying the said \$55,000,000; for this section 7, which commands the requisitions, opens by repealing the clause at the end of section 6 of the act of 1870, which provides that no circulation should be withdrawn under the

National Banks.

provisions of that act until after the \$54,000,000 granted in the 1st section of that act shall be taken up. This clearly shows that the Comptroller is not to look to the residue of the \$54,000,000 to carry out the object of the late act; and the plain import of its language is that requisitions upon the banks described are the only means provided for that end.

I think, then, that there is no interference or clashing between the provisions of the act of June 20, 1874, and the previous acts of Congress, as to the matters under consideration, and that the latter should be administered in respect thereto as before the passage of the former act. Taking the acts together, they seem to permit a distribution to the States and Territories, deficient, of a larger amount than the \$55,000,000 provided by the act of June 20, 1874.

It is further inquired whether it will be lawful to redistribute the \$55,000,000, as applications are made therefor, to any State having less than its proportion, until it shall receive its full apportionment as provided by the act of June 20, 1874. Upon this point, the direction to the Comptroller is to issue and distribute circulating notes "as applications therefor are made" under section 9. The same language is used in section 7. This would seem to leave little discretion in the matter to that officer. And yet, on comparing the direction given to the Comptroller in the proviso to the 1st section of the act of July 12, 1870, to wit, that he shall give the preference to banking associations in such States and Territories as have the greatest deficiency, I think such a construction may be put upon these directions as to give a reasonable and proper effect to both. The Comptroller of the Currency is not to delay, but, upon applications being made with all the requirements provided by the law, he is to answer and satisfy the same with all reasonable expedition, even to the extent of giving to a State its full apportionment; but if, of several applications made at or near the same time, one or more should be from a State or Territory where the deficiency is large, and others from States and Territories where it is less, it would be the duty of the Comptroller to prefer the States or Territories where the deficiency is largest, if all could not be supplied.

The Comptroller inquires, lastly, whether, notwithstanding

National Banks.

the proviso at the end of the 4th section of the act of June 20, 1874, "that the amount of bonds on deposit for circulation shall not be reduced below \$50,000," national banks with a capital of \$50,000 may now be organized as heretofore upon the deposit of \$30,000 of bonds; and whether national banks with a capital of not less than \$150,000 may be organized as heretofore upon a deposit of one-third of their capital stock in United States bonds.

I give to both these questions an affirmative answer.

Section 7 of the "national-bank act," which provides that banks with a capital of \$50,000 may be organized under the conditions and restrictions therein contained, and section 16, which provides that banks shall deposit not less than \$30,000 in United States bonds nor less than one-third of their capital stock paid in, are still living parts of the statute. They are not repealed expressly, and the doctrine concerning repeals by implication applies here with great force; for it would be unreasonable to compel these small banks to deposit the *whole* of their capital in United States bonds, while the larger banks are required to deposit bonds to the amount of only one-third of their capital *paid in*. This could not have been the intent of the proviso. It must be held, I think, to be limited in its application to the case made in section 4.

If banks wish to reduce their circulation and take up their bonds, they may do so, down to the limit of \$50,000 of bonds left on deposit; and the spirit of the act would require that banks having a less deposit of bonds than \$50,000 should not be permitted to take up any of them until their circulation is entirely withdrawn and canceled. But this proviso cannot, I think, be so construed as to prohibit the organization of banks with a capital of \$50,000 on a deposit of \$30,000 in United States bonds, or of other banks on a deposit in bonds to the extent of one-third of their capital.

I am, very respectfully,

GEO. H. WILLIAMS.

HON. CHAS. H. CONANT,

Acting Secretary of the Treasury.

Administration of Oaths in the Settlement of Claims.

COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

The Commissioners of the District of Columbia have authority, under the act of June 20, 1874, chap. 337, to appoint notaries public in and for the District.

DEPARTMENT OF JUSTICE,

July 17, 1874.

SIR: I have considered the question contained in the letter addressed to you by John B. Motley, of date July 11, 1874, and referred to me July 13, 1874, and I have the honor to submit the following in reply to said inquiry:

The office of notary public is one well known to and recognized by this Government. I refer to the act of Congress entitled, "An act to authorize notaries public to take and certify oaths," &c., (9 Stat., 458,) and the "act to provide a government for the District of Columbia," (16 Stat., 419,) approved February 21, 1871. In the 24th section of this act provision is made for the appointment of notaries public.

The late act of Congress "for the government of the District of Columbia, and for other purposes," approved June 20, 1874, sets aside the government for the District provided by the act of February 21, 1871, and gives the powers vested by that act in a governor, legislative assembly, and board of public works, to three commissioners appointed by the President, and expressly confers upon them power "to make appointments to any office authorized by law."

The conclusion is obvious that the Commissioners of the District of Columbia have full power to appoint notaries public in and for said District.

I am, sir, very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General and Acting Attorney-General.

The PRESIDENT.

ADMINISTRATION OF OATHS IN THE SETTLEMENT OF CLAIMS.

Seem that whenever the law makes it the duty of an officer to examine, adjust, and settle claims against the Government, he is impliedly given authority to require such claims to be supported by the oaths of witnesses, where the facts necessary to establish them rest on testimony.

Administration of Oaths in the Settlement of Claims.

The act of February 14, 1871, chap. 51, assumes the existence of authority in heads of Departments and Bureaus to require oaths in cases of claims against the Government, and provides them with a very efficient means for enforcing it.

DEPARTMENT OF JUSTICE,
July 23, 1874.

SIR: I have attentively considered the question put to me in the letter of H. T. Crosby, chief clerk of the War Department, dated July 13, 1874, inclosing a letter of Thomas M. Anderson, major Tenth Infantry, dated at Vicksburg, June 22, 1874.

The question is, "whether there is any law which authorizes the Auditor of the United States Treasury or any of the Executive Departments to require oaths to be administered in cases of claims against the Government."

The 12th section of the act of March 3, 1817, (3 Stat., 368,) provides "that the auditors of the public accounts shall be empowered to administer oaths or affirmations to witnesses in any case in which they may deem it necessary for the due examination of the accounts with which they shall be charged."

The act of July 2, 1836, "to change the organization of the Post-Office Department," in section 19, authorizes the Auditor of that Department, or any mayor of a city, justice of the peace, &c., by him especially designated, to administer oaths and affirmations in relation to the examination and settlement of the accounts committed to his charge, and denounces the penalty of perjury for false swearing in relation to any account of or claim against said Department. (5 Stat., 84.)

When power is given to the examining-officer to administer oaths, there must be the implied power to require them to be taken, to examine witnesses under oath, in order to test the genuineness and legality of the claim.

There are other statutes which presuppose this authority in the Auditor and other officers whose duty it is to examine and adjust claims against the Government. But the act of February 14, 1871, (16 Stat., 412,) is more direct. It provides that "any head of a Department or Bureau in which a claim against the United States is properly pending" may, by the process pointed out in the act, compel the attendance of witnesses and oblige them to make answer to interrogatories and

Administration of Oaths in the Settlement of Claims.

cross-interrogatories, under oath, or to give testimony orally (before any officer authorized to take depositions to be used in the courts of the United States) upon the subject of such claim. This statute assumes that there is authority in heads of Departments and Bureaus to require oaths in case of claims against the Government, and gives them very effective process for the exercise of that authority. Of course, if the needed testimony can be had by affidavits or depositions without the process, it need not be resorted to.

The general question of power in an officer, whose duty it is to examine, adjust, and settle claims, to require the oaths of witnesses to their support, was considered by the Supreme Court in the case of *The United States vs. Bailey*, (9 Peters, 238.) It was an indictment for perjury under the 3d section of the act of March 1, 1823, (3 Stat., 771,) which provided "that if any person should swear or affirm falsely in support of any claim against the United States, he should, upon conviction thereof, suffer as for willful and corrupt perjury." Bailey was charged with swearing falsely to a claim under the act of July, 1832, "to provide for liquidating and paying certain claims of officers commanding in the Virginia line in the war of the Revolution," (4 Stat., 563.) By this act "the Secretary of the Treasury was directed to adjust and settle" the claims referred to. There was no provision in the act as to the manner of proving the claims, no authority expressly given to the Secretary to require that they should be established by the oaths of the parties or of other witnesses. He did, however, make a "regulation" that the claims might be proved by the oaths of witnesses, and that such oaths might be administered by justices of the peace commissioned by the State governments. The affidavit upon which the indictment was founded was made before a justice of the peace in the State of Kentucky.

One of the questions in the case was, whether the Secretary of the Treasury had power to require that the claims should be supported by the oaths of witnesses; and Mr. Justice Story, in delivering the judgment of the court, said, in substance, (9 Peters, 253,) that the Secretary of the Treasury had an implied power to require and authorize the claims to be proved by affidavits. "It was incident to his duty and au-

 Removal of Territorial Officers.

thority in settling claims under the act." "It is a general principle of law," said that great jurist, "in the construction of all powers of this sort, that when the end is required the appropriate means are given. It is the duty of the Secretary to adjust and settle these claims, and in order to do so he must have authority to require suitable vouchers and evidence of the facts which are to establish the claim. No one can well doubt the propriety of requiring the facts which are to support a claim and rest on testimony to be established under the sanction of an oath." The indictment was sustained.

From this case this rule may, I think, fairly be drawn: that whenever the law imposes upon an officer the duty to examine, adjust, and settle claims against the Government, it gives him authority to "require" that those claims shall be established, or supported at least, by the oaths of witnesses.

I am, sir, very respectfully,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,
Secretary of War.

 REMOVAL OF TERRITORIAL OFFICERS.

As a general rule, the governor of a Territory can remove only such officers as have been duly appointed by him to hold at pleasure.

He has no power to remove officers appointed during pleasure by others than himself, or officers whose tenure is for a stated term, or for good behavior, unless so authorized by the organic law or (in some cases) by the territorial law.

Accordingly, where certain officers created by a territorial statute were appointed by the governor, with the consent of the council of the Territory, for the term of two years: *Held* that, in the absence of a power of removal expressly conferred by law upon the governor, those officers are not removable by him.

DEPARTMENT OF JUSTICE,
July 24, 1874.

SIR: In accordance with the direction of the Attorney-General I have considered, and herewith reply to, the question put in your letter of the 6th instant, addressed to the President, *i. e.*, whether, as governor of Colorado, you possess the power to remove or suspend territorial officers for cause, of under any circumstances.

Removal of Territorial Officers.

In this connection it is necessary to consider that public officers *hold* either (1) *during good behavior*, or (2) *for a term of years*, or (3) *during pleasure*. Even where they hold for a term, there is an implied condition that they be of good behavior during the same, or otherwise be ousted before it expires.

In either of the cases first named "good behavior" is a question of law, to be decided by whatever tribunal has jurisdiction thereof. Ordinarily, the right of an incumbent to his office is a *judicial* question, and therefore is to be decided by a court. (*Hoke vs. Henderson*, 4 Dev., 1.) *Impliedly*, a governor has no power to decide it. (*Vail vs. Draper*, 48 Mo., 213.) Such power may be conferred upon him by an *express* provision of law, *i. e.*, either by constitution, or, where that is silent and consenting, by act of assembly. In the third class mentioned above, a power of removal at pleasure is vested in the officer or body vested with the power of appointment. This seems to be well-established American constitutional law. (Story, Const., sec. 1537; *Ex parte Hennen*, 13 Peters, 225; also 5 Sergeant and Rawle, 451; 24 Texas, 253; 6 Caldwell, 486; 44 Mississippi, 352; Deady, 204.)

In general, therefore, the governor of a Territory can remove only such officers as have been *duly appointed by the governor to hold at pleasure*. He has no power to remove officers appointed during pleasure by others than the governor, unless the organic law, or, in some cases at least, the territorial law expressly so authorize him. He cannot remove officers whose tenure is for a term of years, or good behavior, unless so authorized by the organic law, or, in some cases, by the territorial law.

I have looked through the organic and territorial law of Colorado without being able to find that special powers of removing public officers are vested in the governor. The auditor and the treasurer, mentioned by you, are officers created by a territorial statute, and appointed by the governor with the consent of the council, to hold for two years. (Organic act, sec. 7, and Rev. Stat., 1867, chap. 9, sec. 1.) They are, therefore, not removable by the governor.

I presume that the above statement of principles is all that is necessary to guide your excellency, and therefore will not

Case of the Biddle Manufacturing Company.

detain you by a specific application of them to each of the officials of the Territory.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General and Acting Attorney-General.

To EDWARD M. MCCOOK,

Governor of Colorado.

CASE OF THE BIDDLE MANUFACTURING COMPANY.

The Biddle Manufacturing Company contracted with the Government to manufacture a gun, payment therefor to be made in installments as the work progressed, and afterward subcontracted with the South Boston Company for the performance of the work; the latter also to be paid by installments as the work progressed. The former company was in fact an individual only, who subsequently became insolvent and against whom a petition in bankruptcy was then filed. An installment is due from the Government to the Biddle Company, and likewise one from the latter to the Boston Company, this last debt being a lien on the gun. *Advised* that payment to the Biddle Company be reserved until the questions before the bankruptcy court on said petition are determined; but that the Government can safely and with propriety discharge any lien which has arisen or which may arise in favor of the Boston Company in connection with the fabrication of the gun, until its completion.

DEPARTMENT OF JUSTICE,

July 27, 1874.

SIR: Yours of the 16th instant, referring to a contract made by the Ordnance Bureau with the Biddle Manufacturing Company for the fabrication of a Thompson 12-inch breech-loading rifle, asks whether, under the circumstances which at present surround this contract, the proposition of Nathan Thompson, that, upon his filing a certain bond for indemnity, the United States shall pay to him such installments as may be due upon the contract, can legally be accepted.

The facts of the case are as follows: In June, 1873, the United States contracted with the Biddle Manufacturing Company for the gun in question, which was to be paid for in installments as the work progressed, and it was agreed that, although the United States looked only to the Biddle Company as contractors, the latter might procure such gun to be made *for them* by the South Boston Company. There-

Case of the Biddle Manufacturing Company.

upon a *subcontract* was made between the Biddle Company and such South Boston Company, in which the payments were to be made by installments as in the *contract*. The Biddle Manufacturing Company was in fact only one Bancroft, who took that as the *style* of his business in manufacturing hardware. In December, 1873, Bancroft became insolvent, and shortly afterward a petition was filed against him in bankruptcy, but, as yet, no adjudication has been had. The Boston Company has proceeded with the gun, and at the present time an installment is due to it by the Biddle Company, and also one by the United States to the latter. The debt to the Boston Company, and certain other smaller debts in connection with the fabrication of the gun, are secured by lien.

If the Biddle Company had retained the making of the gun in its own hands, upon the coming due of this installment the United States would have reserved payment until the questions pending before the court of bankruptcy had been determined.

In my opinion, so far as the interest of the Biddle Manufacturing Company is concerned, this is the correct course to be taken in the present case by the agents of the Government, even although it be true, as is said by certain persons, that Bancroft was really no party to the contract, and that the name of the Biddle Manufacturing Company was employed by Mr. George Biddle, (who has certain business connections with Mr. Thompson, the patentee of the gun,) with the consent of Bancroft, and that without any very clearly-defined purposes; Bancroft being in fact interested only as having bargained with Thompson in consideration of certain prior advancements, &c., for one-quarter of the net profits upon this *experimental* gun.

It seems that, even under this statement, a court of bankruptcy may require the interest of the Biddle Company to be ascertained and administered there; but, even if Bancroft turns out to have no interest in the contract, it is proper that the United States await the determination of that fact by the court before taking any steps tending to involve it in litigation. I think that the offer of an indemnity-bond ought not to vary this action. The circumstances under which the United States have made this contract with the Biddle Man-

Attachment.

ufacturing Company, (whoever that may be,) suggest no reason why they should run further risk of suing or being sued, whether upon the indemnity-bond or otherwise.

The report of the Judge-Advocate-General of the 11th instant, which accompanies your letter, and to which you invite attention, mentions that payment of the amounts due or to become due to the South Boston Iron Company and others is one main object of a just settlement in this case. I will, therefore, add, that the complications which surround the claims of the *parties* contracting with the United States, including the proceedings in bankruptcy against Bancroft, do not affect the right of the Government to discharge all liens that have arisen, or may arise, in connection with that gun, until its completion; and that all amounts so paid to the lienholders, not exceeding the original price of the gun, can be claimed in any settlement hereafter to be made with whoever was the original party to the contract, whether Mr. George Biddle, the Biddle Manufacturing Company, or any assignee in bankruptcy or otherwise, that may stand in its shoes, as is recognized in *Gregg's Case*, (3 Bank. Reg., 131.) This will secure the interest of the Government in this contract; and if the other party thereto, whoever he be, is delayed in receiving the money due to him, that will result from the unfortunate manner in which the name of the Biddle Manufacturing Company has been introduced therein, a circumstance about which, as is conceded, the agents of the Government are entirely blameless.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General and Acting Attorney-General.

Hon. Wm. W. BELKNAP,

Secretary of War.

ATTACHMENT.

Personal property situated within the limits of a national cemetery, and belonging to a contractor with the Government, may be attached on meane process issued by a court of the State, if in the cession of jurisdiction by the State over the land of the cemetery, or in the consent of the State to its purchase by the United States, there was a reservation of the right to serve civil process on said land.

Attac ment.

DEPARTMENT OF JUSTICE,
July 29, 1874.

SIR: The following question is proposed by Henry W. Scott, "contractor," in his letter dated July 16, 1874, addressed to the Quartermaster-General, which letter was referred to me by you July 24, 1874: Is property within the inclosure of a United States national cemetery, to be used for the United States by a contractor on the ground, liable to attachment or levy, under any circumstances, without a judgment being first obtained against such contractor?

From the Quartermaster-General's indorsement on the letter, it appears that the title to the property in question is in the contractor, and that the United States have no claim to it. By the Constitution, Congress has power to exercise "exclusive legislation" "in all cases whatsoever" over all places purchased by the consent of the legislature of any State "for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." No time need be spent in showing that land purchased for cemeteries is within this provision of the Constitution. The Government has decided that these places and the structures on them are "needful." It was long ago held, and the decision has been acquiesced in, that "exclusive jurisdiction is the attendant upon exclusive legislation," and that when a State for the purposes mentioned has given its consent to the purchase of land within its limits by the United States, the State jurisdiction is completely ousted. (*United States vs. Cornell*, 2 Mason, 60, 63; 1 Kent Com., 429.)

It follows in such case that no State process, civil or criminal, can run upon said lands, unless there is a special exception or reservation in the cession or in the State's consent to the purchase, (1 Woodbury & Minot, 76-82;) and it is my opinion that personal property upon lands ceded to the United States without condition is not subject to be levied on by attachment or any other process issued by the authority of the State; it is subject to United States process only. But if, as is usually the case, the State in making the cession, or in giving its consent to the purchase, reserved the right to serve and execute its process upon the land, or annexed any

Land-Grant Railroads.

other like condition, it has been held that the acceptance of a cession with this reservation amounts to an agreement on the part of the United States to permit the free exercise of such process as being *quoad hoc* its own process, "and upon any other construction the cession would be nugatory and void," (1 Kent Com., 429, 430, and the case above cited, 2 Mason, 65, 66; also, *United States vs. Davis*, 5 Mason, 356.)

I think, therefore, that if the lands of any national cemetery were ceded or the purchase thereof consented to by the State within whose boundaries they are, with a reservation of "concurrent jurisdiction," or of the right to serve its process on said lands, personal property within the inclosure of such cemetery is liable to be taken by writ of attachment or any other lawful process issued by the authority of said State, if the title to the property is in the defendant, whether he be the contractor for such cemetery or any other person. As the writ of attachment is mesne process and precedes judgment, the last clause of the question is answered.

I am, sir, very respectfully,

S. F. PHILLIPS,

Solicitor-General and Acting Attorney-General.

Hon. WM. W. BELKNAP,

Secretary of War.

LAND-GRANT RAILROADS.

The prohibition in the act of June 16, 1874, chap. 285, forbidding payment for the transportation of troops or property of the United States over any railroad which, in whole or in part, was constructed by the aid of a grant of public land, on condition that such railroad should be a public highway for the use of the Government, &c., is applicable to so much of the road as lies between the termini thereof which existed at the time the grant was made. Extensions subsequently made beyond either terminus, as well as leased roads, &c., are not affected by the prohibition.

DEPARTMENT OF JUSTICE,

July 30, 1874.

SIR: In yours of the 29th instant you ask, whether, under the act making appropriations for the support of the Army for the fiscal year ending June 30, 1875, approved June 16, 1874, which forbids payment "to any railroad for the trans-

Land-Grant Railroads.

portation of any property or troops of the United States over any railroad which, *in whole or in part*, was constructed by the aid of a grant of public land on the condition that such railroad should be a public highway for the use of the Government of the United States free from toll or other charges," or upon any other conditions for the use of such roads, or such transportation, payment may be made out of said appropriation to any railroad company for the transportation of property or troops of the United States over any part or branch not constructed by the aid of a grant of public lands, though said part or branch is an extension, or branch, or part of a road built by the aid of a grant of public land on the above-named conditions.

The railroad, for the transportation of property, &c., over which no part of the appropriation was to be used, is, as appears by your citation, one constructed, in whole or in part, by a land-grant made on the condition that *such railroad* should be a public highway, &c.

A road existing in contemplation, or unfinished, whether railroad or other, is defined and identified by its track and termini. A substantial change of terminus destroys identity, as is shown in the numerous cases where such change has been successfully resisted by subscribers to the original undertaking. If, therefore, a land-grant has been made to a company to aid it in constructing, in whole or in part, a road between certain termini, upon condition of a certain use of *such railroad*, such condition affects the whole of what lies between the termini mentioned; no more, no less. Any subsequent change of terminus by which, suppose, the road is extended, or, on the contrary, is transferred in part to another company, will not affect the original application of the condition. The latter continues in its original extent, and, where a part of the road has been transferred, follows it in the hands of its new owner. The circumstance that the company which operated the original road continues to operate it as extended or curtailed, without any change of name, does not affect the question, which, in every case, is as to the termini of the road at the time that the condition was affixed, the subject-matter to which such condition adheres being a road of such termini.

WISCONSIN LAND-GRAnt—CONDitiON-SUBSEQUENT.

Therefore, to refer to the cases put by the Quartermaster-General in the communication which you inclose:

1. The road now operated by the Atchison, Topeka and Santa Fé Railroad Company, at the time when it was aided by a land-grant to the State of Kansas, had for termini Atchison and the western line of Kansas. Since then the company has extended the line farther west. The condition attached to the grant affects the road only to the western line of Kansas.

2. The Vicksburg and Meridian Railroad, when aided by land-grants, had for termini Jackson and Meridian. Afterward the road was extended westwardly to Vicksburg. This extension is not affected by the condition.

3. Other companies subsequent to the time when the land-grants were made, and when the condition attached, have built branch roads, or taken other roads by lease, and are operating them in connection with their original roads, and as parts thereof. Such additions are unaffected by the condition.

With great respect, your obedient servant,

S. F. PHILLIPS,

Solicitor-General and Acting Attorney-General.

The SECRETARY OF WAR.

WISCONSIN LAND-GRAnt—CONDitiON-SUBSEQUENT.

The act of June 3, 1856, chap. 43, granting public land to the State of Wisconsin, to aid in the construction of a railroad "from Saint Croix river or lake to the west end of Lake Superior and to Bayfield," considered and construed.

The provision in the 4th section, viz, that if the road mentioned is not completed within ten years "no further sales shall be made, and the land unsold shall revert to the United States," contains two conditions—one affecting the *power to dispose* of the land by the State, and the other affecting the *title* of the State to the land.

By the former, upon the happening of the contingency referred to, (the non-completion of the road within the time limited,) the authority of the State to dispose of the land is *ipso facto* determined.

By the latter, upon the happening of the same contingency, all of the land *then remaining unsold* is to revert to the United States; but whether the title thereto is divested out of the State and revested in the United States immediately upon default in the condition, or whether some act

Wisconsin Land-Grant—Condition-Subsequent.

on the part of the United States, showing an intention to take advantage of the default, is necessary first to be done in order to defeat the title of the State, *quære*.

Authorities touching the operation and effect of conditions-subsequent in legislative grants, together with the doctrine of the common law respecting the operation and effect of such conditions generally, adverted to and commented on.

Distinction drawn between a legislative grant upon condition-subsequent and a grant by an individual upon a similar condition, where the common law prevails: thus, in the latter case, the condition cannot be made by the grantor to operate otherwise than in subordination to the rule of the common law; while in the former case it may be made to operate contrary to and irrespective of the common-law rule, if that should be thought expedient by the legislature.

The following conclusions accordingly arrived at :

1. The operation of conditions-subsequent in congressional land-grants does not depend upon the rules of the common law applicable to such conditions, but upon the intention of Congress as gathered from the language of the grant itself.

2. Hence, whether the non-fulfillment of the condition in the Wisconsin land-grant act of June 3, 1856, *ipso facto* avoids the title of the State to the unsold lands and reverts them in the United States, or whether it merely renders such title voidable and liable to be defeated thereafter when the United States by some act manifest their desire to resume the lands, is purely a question of statutory interpretation.

3. Looking at the whole of that act, and taking into consideration the peculiar features of the grant contained therein, the particular provision in which the said condition is found may reasonably be construed to have the effect, *proprio vigore*, of avoiding the title of the State and of re-uniting the unsold lands to the public domain of the United States immediately upon the non-fulfillment of the condition.

4. Yet, assuming (as is done here, for the purposes of this case) the correct construction of such provision to be that the lands do not, by the non-fulfillment of the condition, *ipso facto* revert to the United States, but that some action on the part of the latter showing an intention to take advantage of the default is necessary *besides* in order to re-vest the lands therein, an act of the executive branch of the Government is sufficient for the accomplishment of that result.

5. Such act may consist simply in the promulgation of an order restoring the lands to settlement and to market, which order it is competent to the Secretary of the Interior to issue.

DEPARTMENT OF JUSTICE,

August 6, 1874.

SIR: Your communication of the 24th of August, 1872, in regard to the land-grant made by Congress to the State of

Wisconsin Land-Grant—Condition-Subsequent.

Wisconsin in aid of a railroad from Saint Croix river or lake to the west end of Lake Superior and to Bayfield, requests my opinion upon the question whether you are "authorized to declare the said grant to be forfeited and to order the restoration of the granted lands to settlement and to market."

The grant referred to is that contained in the act of June 3, 1856, (11 Stat., 20,) the provisions whereof, so far as material to the subject-matter of the inquiry, are the following :

By the 1st section of the act it is provided, "That there be, and is hereby, granted to the State of Wisconsin, for the purpose of aiding in the construction of a railroad" from and to the points above mentioned, "every alternate section of land designated by odd numbers, for six sections in width on each side of said road respectively. But in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any sections or parts thereof granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the governor of the State, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tier of sections above specified, so much land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption has attached, as aforesaid, which lands (thus selected in lieu of those sold and to which pre-emption has attached as aforesaid, together with the sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by the State of Wisconsin for the use and purpose aforesaid: *Provided*, That the lands to be so located shall in no case be farther than fifteen miles from the line of the roads in each case, and selected for and on account of said roads: *Provided further*, That the lands hereby granted shall be exclusively applied in the construction of that road for which it was granted and selected, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever."

The 3d section declares that the lands "granted to said

Wisconsin Land-Grant—Condition-Subsequent.

State shall be subject to the disposal of the legislature thereof, for the purposes aforesaid, and no other."

The 4th section provides, "That the lands hereby granted to said State shall be disposed of by the said State only in the manner following, that is to say, that a quantity of land not exceeding one hundred and twenty sections, and included within a continuous length of twenty miles of roads, respectively, may be sold; and when the governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of either of said roads are completed, then another like quantity of land hereby granted may be sold; and so from time to time until said roads are completed; *and if said roads are not completed within ten years, no further sales shall be made, and the land unsold shall revert to the United States.*"

By the 5th section of the act of May 5, 1864, (13 Stat., 67,) the time fixed and limited for the completion of the said railroad in the act of June 3, 1856, was extended to a period of five years from and after the passage of the former act; in other words, *until* the 6th of May, 1869.

You inform me that the road was not completed at the date last named, and that since then efforts have been made to obtain from Congress an extension of time for its completion, but that they have failed. You also inform me that all of the public lands lying within the limits of the said grant were withdrawn from settlement and market soon after it was made, and that these lands have so remained up to the present time.

Recurring to the provisions of the act of 1856, above set forth, it will be seen that though the grant made by that act is in terms a grant *in presenti*, yet that until the line or route of the road described therein becomes "definitely fixed," the grant is nevertheless in the nature of a *float*. The definite fixing of the road, however, has long since taken place, and the grant thus been located.

Upon the definite fixing of the road, the grant immediately attached to the alternate sections, designated by odd numbers, lying within the "six-mile limits," which had not previously been pre-empted, sold, or otherwise appropriated; and with respect to the lands lying within the "indemnity-limits,"

Wisconsin Land-Grant—Condition-Subsequent.

it attached to such selections as may have been made by the agents of the State, in lieu of those sold or subject to pre-emption, immediately upon the approval thereof by the Secretary of the Interior. After the grant attached to any particular section or parcel of land, either within the six-mile limits or within the indemnity-limits, the State at once became seized of the same by force of the statute alone; but such seizure was only for the use and purpose specified in the statute, viz, for aiding in the construction of the railroad mentioned.

By the terms of the grant, the lands were to be applied to that purpose exclusively, and disposed of by the State only as the work progressed, and their disposition was, besides, required to be made only in the mode prescribed by the statute. That mode was this: A quantity of land within a continuous length of twenty miles of road, not exceeding one hundred and twenty sections, was, in the first place, authorized to be sold; then, upon the governor of the State certifying to the Secretary of the Interior that any continuous twenty miles of the road is completed, another like quantity was authorized to be sold, and so on, until the completion of the road. But, as has already been shown, the grant provides that if the road is not completed within a stated period "*no further sales shall be made, and the lands unsold shall revert to the United States.*" And, inasmuch as this provision places a qualification upon the grant, its effect will now be considered in connection with the subject under examination.

The provision just adverted to seems to contain two conditions; one affecting the *power to dispose* of the land by the grantee, and the other affecting the *title* of the grantee to the land.

By the one, upon the happening of the contingency referred to, (viz, the non-completion of the road within the time limited,) the authority of the State to dispose of the land is, I think, *ipso facto* determined. The language of the provision is that, in that case, "*no further sales shall be made*"—terms which amount to a direct and positive *prohibition* of any sale of the land thenceforth by the State; and I cannot conceive that anything more is required, in order that such prohibition may take effect, than the mere failure to complete the road within the period limited. This position is strengthened by

Wisconsin Land-Grant—Condition-Subsequent.

some remarks of the Supreme Court of the United States, in the case of *Rice vs. Railroad Company*, (1 Black., 381,) made in reference to a similar authority determinable upon the non-fulfillment of a condition, the authority here alluded to being that conferred by section 4 of the act of June 29, 1854, entitled "An act to aid the Territory of Minnesota in the construction of a railroad therein." After adverting to the period fixed in that section for the completion of the contemplated improvement, the court, in the case above cited, observes: "Ten years were allowed for the purpose, and, if the work was not completed within that time, then the power of the Territory to dispose of the lands was to cease without any further action on the part of Congress."

By the other condition, upon the happening of the same contingency, *the land then remaining unsold* is to revert to the United States. Here the grant makes provision for a conditional divesting of the title to such land out of the grantee, (the State,) and revesting the same in the grantor, (the United States,) and the question now arises, whether this change of ownership takes place immediately upon default in the condition by virtue of that provision alone, and without any act on the part of the grantor, or whether some act of the latter showing an intention to take advantage of the default is necessary first to be done, in order to defeat the title of the grantee.

There are authorities which draw a distinction between the operation of *conditions of this kind in legislative grants* and the operation of similar conditions in grants made by private parties. Thus it has been held that where an estate is conveyed by the deed of an individual, subject to be defeated by the breach of a condition subsequent, if the condition is broken it is necessary that the grantor or person authorized to take advantage of it should either enter or do some other act equally effectual, in order to divest the estate; but that where an estate is granted by a legislative act, subject to forfeiture by the happening of some future event, if the event occur no act is necessary to be done in order to revest the estate in the Government, it revesting immediately upon the happening of the contingency. (*Kennedy vs. McCartney*, 4 Port., 157; see, also, *Gill vs. Taylor*, 3 Port., 185; *University of Ala-*

 Wisconsin Land-Grant—Condition-Subsequent.

bama vs. *Winslow*, 5 Stew. & Port., 25 *et seq.*; *Rogers* vs. *Rawlings*, 8 Port., 325; *Crommulin* vs. *Minter*, 9 Ala., 594; 2 Washb. on Real Prop., par. 24, p. 524.)

Congress has also employed language in reference to a conditional land-grant similar to the one under consideration, which apparently favors the view expressed in the latter clause of the preceding paragraph. In the 1st section of the act of July 28, 1866, (14 Stat., 338,) reviving the grant made to the States of Arkansas and Missouri by the act of February 9, 1853, (10 Stat., 155,) to aid in the construction of a certain railroad, it is provided that "all the lands therein granted, which reverted to the United States under the provisions of said act of 1853," shall be "subject to the uses and trusts in all respects as they were before and at the time such reversion took effect." The period limited for the completion of the road just referred to had expired in 1863, and the condition of the grant was then unfulfilled. Nothing appears to have been done by the Government to defeat the title of the grantees between that time and the passage of the act of 1866; and yet, in this act, Congress obviously assumes that the United States have already become re-invested with the title to the lands. Indeed, the mere passing of the act *reviving* the former grant would seem to proceed on the supposition that the title or interest imparted by such grant had previously ceased to exist. Other instances in which Congress has *revived* grants of the same character are found in the acts of April 10, 1869, and March 3, 1871, (16 Stat., 45, 580,) renewing certain grants to the State of Alabama. These acts, together with the act of 1866, in which the language quoted above is used, certainly look as if Congress, at the time of their enactment, regarded the *reversion* of the lands to the United States, under the conditions in the grants therein referred to, as having actually taken place upon the non-fulfillment of the condition simply.

On the other hand, there is authority favoring the opposite view, namely, that in a legislative grant of lands upon condition subsequent, similar to the conditions just mentioned, the lands do not *ipso facto* revert in the Government by the mere default in the condition, but that some act on the part of the Government manifesting an intention to take advan-

Wisconsin Land-Grant—Condition-Subsequent.

tage of the default is essential to defeat the title of the grantee. I refer to the recent case of *Schulenberg et al. vs. Harriman*, reported in 2 Dillon, 398. This authority is entitled to great weight here by reason of the eminence of the judges who gave the opinion, and also from the circumstance that the opinion was given in a case involving the construction of the very grant now under examination.

The case just cited was an action of replevin to recover a quantity of saw-logs, which was originally brought in the district court of the first judicial district of the State of Minnesota in 1871, and afterward removed into the circuit court of the United States for the district of Minnesota. The logs had been cut by the plaintiffs during the logging season of 1870-'71, upon odd sections of the lands granted by Congress to the State of Wisconsin by the aforesaid act of June 3, 1856, to aid in the construction of a railroad from Saint Croix river or lake to Lake Superior and to Bayfield; but they had been subsequently seized by, and at the time of bringing the suit were still in possession of, the defendant, an agent of the State of Wisconsin, as the property of that State. It was admitted on the trial that no part of said railroad had ever been constructed; and the plaintiffs, among other things, claimed that the title to the lands on which the logs were cut had, previous to the cutting, reverted to the United States by reason of the failure to complete the road within the time limited, which expired on the 5th of May, 1869. The court, however, ruled "that the lands had not reverted to the United States, there having been no judicial proceeding, no act of Congress, and no other act of the General Government to take advantage of the failure to build the railroad or to declare the forfeiture."

Moreover, Congress has in three instances that have come under my notice passed acts declaring forfeited lands which had been granted for similar purposes and upon similar conditions to the above, long after the happening of a default in the condition of the grant; and this legislation *seemingly* rests on the assumption that such default did not *ipso facto* determine the title of the grantee to the lands. The first of these is the act of July 14, 1870, entitled "An act to declare forfeited to the United States certain lands granted to the

Wisconsin Land-Grant—Condition-Subsequent.

State of Louisiana to aid in constructing a railroad therein," (see 16 Stat., 277;) the next is the act of April 15, 1874, entitled "An act to forfeit to the United States certain lands granted to the Placerville and Sacramento Valley Railroad Company to aid in constructing a railroad from the town of Folsom to the town of Placerville, in the State of California;" and the third is the act of June 15, 1874, entitled "An act to forfeit certain public lands granted to the Stockton and Copperopolis Railroad, in the State of California." Still, in all of these acts the grants referred to are stated to have "expired by limitation;" from which it might be inferred that Congress at least regarded those *grants* as having *ipso facto* determined by the default in the conditions contained therein; for the language in the acts expressing that the grants had "expired by limitation" obviously means that they had terminated by the failure to build the roads within the time fixed in the conditions, or, in other words, by the non-fulfillment of the conditions.

The view advanced in the case last referred to (the case in 2 Dillon, *supra*) seems to be founded on the doctrine of conditions at the common law, according to which, where an estate was granted upon a condition-subsequent, the breach of the condition did not *ipso facto* revert the estate in the grantor, but only gave him a right to resume it, which might be enforced or waived at his election. Hence, if he wanted to take advantage of the breach, it was necessary that some act should be done by him manifesting his intention to resume the estate; and the act required in such case was an entry, or what in law was equivalent thereto. No estate of freehold could be created at the common law without livery, and the rule was that where an estate began by livery it could only be avoided by some act *in pais* of equal notoriety. An entry was consequently necessary to determine an estate of freehold for condition broken, even when the estate was to become absolutely void on breach, because, whatever might be the terms of the condition, the grantor had nothing until entry made. It was also a rule that where an entry was necessary in the case of a common person, an "inquest of office" was necessary in the case of the crown. But this rule does not appear to have been deemed appli-

 Wisconsin Land-Grant—Condition-Subsequent.

cable to cases where the crown became entitled to resume lands granted by the British colonial authorities on conditions-subsequent, in consequence of the failure of the grantees to perform the conditions. The proper manner of making such resumption, as it seems from high authority, was simply by making new grants to such as were willing to accept them. (See a joint opinion given by the Attorney and Solicitor Generals, Sir Dudley Ryder and Sir William Murray, afterward Lord Mansfield, in Forsyth's "Cases and Opinions on Const. Law," p. 145.)

Inquest of office, or "office," as it is sometimes termed was an inquiry made through the medium of a jury by the sheriff, coroner, or escheater, *virtute officii*, or by writ to them sent for that purpose, or by commissioners specially appointed, concerning any matter that entitled the crown to the possession of lands or tenements, goods or chattels. It was of two kinds, one of which was an office of *entitling*; this was to vest the estate and possession of land, &c., in the king where he had only right or title before; and the other was an office of *instruction*; this took place where the estate of land, &c., was lawfully in the king before, but the particularity of the land, &c., did not appear of record, the object being to instruct the king of the certainty of the land, so that it might be put in charge. (See Vin. Abr., vol. 16, p. 79.) I am not aware of the existence of any law of the United States making provision for inquests or offices of this sort; and in the absence of such law, there is manifestly much stronger ground for holding the aforesaid rule of the common law as to the necessity of an office to be inapplicable to cases where the Government becomes entitled to resume lands granted by Congress on condition, for default in the condition, than there was in considering it inapplicable to the cases on which the opinion just cited was given.

It seems to me, however, that there is a very great difference between a legislative grant of a freehold estate upon condition-subsequent, and a grant of such an estate by an individual upon a similar condition, where the doctrines of the common law prevail. In the latter case, the condition in the grant cannot be made to operate otherwise than in subordination to the rules of the common law; and hence, even

Wisconsin Land-Grant—Condition-Subsequent.

though it were to provide, in positive terms, that the estate should be absolutely void and cease on breach, yet the estate would, nevertheless, be voidable only, and would continue in the grantee after the breach until defeated by entry. Whereas in the former case the condition in the grant can be made to operate contrary to and irrespective of the rules of the common law, if that should be thought expedient by the legislature. So that the question whether the breach of a condition-subsequent in a statutory grant avoids the estate and at once reverts it in the Government, or whether the estate becomes merely voidable by the breach, as at common law, and continues thereafter in the grantee until it is in some legal mode resumed by the Government, is simply one of interpretation. If by the provisions in such grant it plainly appears that the legislature intended that the estate should absolutely determine upon breach of the condition, that intention must be deemed decisive of the question. Thus, where a forfeiture is given by statute, the period when the forfeiture vests depends entirely upon the construction of the statute, though at the common law a forfeiture does not vest in the Government until some legal step is taken for the assertion of its right; since the rules of the common law may be dispensed with by the legislature, and the thing forfeited may either vest immediately, or on the performance of some particular act, according to the legislative will. (See *United States vs. Grundy*, 3 Cranch, 351.)

Now, with respect to the grant of lands to the State of Wisconsin, at present before me, when it is taken into consideration that those lands were granted (not for such uses and purposes in general as the State might choose to appropriate them to, but) for a specified object, namely, to aid in the construction of a certain railroad, and by the express terms of the grant were required to be disposed of by the State for that object exclusively; that they were, moreover, required to be disposed of only as the work progressed, under certain restrictions, both as to the quantity and the location of the land to be sold; and that upon the happening of a certain contingency (viz, the non-completion of the road within a stated period) the power of the State to make any disposition of such of the lands as then remained undisposed of was to

Wisconsin Land-Grant—Condition-Subsequent.

cease; thus, up to this point, leaving in the State but a naked title thereto, stripped of all right of alienating the lands or of appropriating them to any use or purpose whatever; when these features of the grant (and especially the latter) are considered, it could hardly be regarded as a forced construction of the further provision contained in the grant, which, in substance, declares that upon the happening of the same contingency above mentioned the lands then remaining unsold shall also revert to the grantor. I repeat, it could hardly be regarded as a forced construction of such provision to hold that it operated *per se* to put an end to the title of the State to the unsold lands immediately upon the happening of said contingency, and to revest these lands in the United States. For it may have occurred to Congress that after the power of the State to dispose of or appropriate the land to any use or purpose once ceased, neither the interests of the State nor those of the United States would be subserved by a continuance of the naked title in the former; and thus viewing the matter, it would seem to be quite natural for Congress to provide, and the terms actually employed in the grant are not inconsistent with an intention so to provide, that when *that power* determined, the *title* of the State should also determine, and the land thereupon become revested in the United States, without any future action on the part of the latter.

The clause in the grant providing for a conditional determination of the power of the State to dispose of the land, and also for a conditional determination of the title of the State to the land, reads: "If said roads are not completed within ten years, no further sales shall be made, and the land unsold shall revert to the United States." As the *determination* in both cases is there made to depend upon the same contingency, in terms of exactly the same import (grammatically considered) in regard to the *time* of its accomplishment, the inference might fairly be drawn that it was intended to transpire and become completed in both cases at the same moment. And here I may again refer to the opinion of the court in *Rice vs. Railroad Company*, cited above, where, in the sentence immediately following the remarks hereinbefore quoted therefrom, will be found language which, taken in connection

Wisconsin Land-Grant—Condition—Subsequent.

with those remarks, would seem to support this view. It is very clear that under the above construction of the provision for a conditional revesting of the lands in the United States, the lands unsold at the time of the default in the condition must necessarily be considered as having *then* become reunited to the public domain and subject to the laws relating thereto.

But assuming, as I do, for present purposes, that the interpretation of that provision given by the court in the above-cited case of *Schulenburg vs. Harriman* (viz, that by such provision the lands did not, on the mere default in the condition, *ipso facto* revert to the Government, but that some act on the part of the latter showing an intention to take advantage of the default was also necessary to effect that result) is correct, the inquiry now presents itself as to the nature of the act required on the part of the Government to resume the lands.

In that case the decision of the court, that the lands had not reverted, is put on the ground (to state it in language of the court) of "there having been no judicial proceeding, no act of Congress, and no *other act* of the General Government to take advantage of the failure to build the railroad or to declare the forfeiture." The "other act" here referred to would seem to be an act proceeding from some department of the Government besides either the judicial or the legislative department, inasmuch as both judicial and legislative action are already enumerated by the court; and as there is but one other department, the executive, it may therefore be understood to be an act of the latter. So that, by fair implication from the language used by the court, an executive act would appear to have been regarded by it as sufficient to take advantage of the non-fulfillment of the condition for the purpose of revesting the lands in the Government. The doctrine of the court apparently is, that, as between the State of Wisconsin and the claimant of the logs cut upon the lands granted to the former by the United States, though the condition on which the grant was made had failed prior to the cutting of the logs, yet, as the United States had never taken any steps, through either its judicial, legislative, or executive department, to resume the lands, the title thereto must *be deemed* to remain still in the State. Accordingly, the infor-

Wisconsin Land-Grant—Condition-Subsequent.

mation received by you (to which reference is made in your communication) to the effect that the court in that case held that the breach of the condition could be taken advantage of, and the lands be resumed by act of Congress *only*, does not seem to be well founded.

We have seen that, in the grant under consideration, Congress has declared that certain of the lands thereby granted should revert to the Government in a certain contingency. As this provision contains nothing indicative of a contrary intention, there is certainly strong ground for the presumption that it was intended to be *of itself* efficient for the accomplishment of what is expressed therein, without being supplemented by future legislative action directed to the same end; and furthermore, that the will of Congress thereby declared was meant to be carried out in this as in other cases, (the duty being purely administrative in its character,) through the executive branch of the Government, with the aid of the judiciary, where the intervention of the latter should become necessary. But I do not perceive that any necessity exists here for recourse to such aid. At common law, an act *in pais* was sufficient to resume an estate forfeited for condition broken; it was not required to have the forfeiture first judicially ascertained. So, in the present case, the lands may be resumed, as it seems to me, by any appropriate action on the part of the executive branch of the Government, without previously obtaining a judicial declaration of forfeiture; and I think that an order issued by your Department restoring the lands to settlement and to market would be a proper mode of resuming them, and adequate for the purpose. That it is competent to your Department to issue such order, I entertain no doubt.

The following is a *résumé* of the general conclusions at which I have arrived touching the subject submitted:

1. The operation of conditions subsequent in congressional grants of public lands does not depend upon the rules of the common law applicable to such conditions, but upon the intention of Congress as gathered from the language employed in the grant itself.

2. Hence, whether the non-fulfillment of the condition in the Wisconsin land-grant act of June 3, 1856, (viz, that if the

Wisconsin Land-Grant—Condition-Subsequent.

road is not completed within a certain period, so much of the granted lands as might then remain unsold by the State should revert to the United States,) *ipso facto* avoids the title of the State to the unsold lands and reverts the same in the United States, or whether it merely renders such title voidable and liable to be defeated thereafter when the United States by some act manifest their desire to resume the lands, is purely a question of statutory interpretation.

3. Looking at the whole of that act, and taking into consideration the peculiar features of the grant contained therein, the particular provision in which the aforesaid condition is found may reasonably be construed to have the effect, *proprio rigore*, of avoiding the title of the State and of re-uniting the unsold lands to the public domain of the United States, immediately upon the non-fulfillment of the condition.

4. Yet, assuming (as is done here, for the purposes of this case) the correct construction of such provision to be that the lands do not, by the non-fulfillment of the condition, *ipso facto* revert to the United States, but that some action on the part of the latter showing an intention to take advantage of the default is necessary *besides* in order to revert the lands therein, an act of the executive branch of the Government would seem to be sufficient for the accomplishment of that result.

5. Such act may consist simply in the promulgation of an order restoring the lands to settlement and to market, which order it is competent to the Secretary of the Interior to issue.

I may add that the view last expressed appears to furnish an answer to the question propounded by you in terms so direct and explicit as to render a more formal one from me unnecessary.

I have the honor to be, very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. C. DELANO,

Secretary of the Interior.

NOTE.—The case of *Schulenberg et al. vs. Harriman*, (2 Dillon, 398,) mentioned in the foregoing opinion, was carried by writ of error before the Supreme Court of the United States, where it was heard on the points raised by the record, and determined, during October term, 1874. (See 21 Wall., 44.) The Supreme Court, in that case, held that the provision in

District of Columbia 3.65 Bonds.

the Wisconsin land-grant act of June 3, 1856, that all lands remaining unsold after ten years shall revert to the United States, if the railroad therein referred to be not then completed, is a condition subsequent, and that the title of the grantee in the lands, after breach of the condition, remains unimpaired until the forfeiture arising on such breach is enforced by the grantor; and it is intimated by the court that the *only* mode of enforcing a forfeiture on that ground, in the grant under consideration, is by a judicial proceeding or by a legislative assertion of ownership, though this point was not really involved in the case before it. The court, however, remark that "a legislative grant operates as a *law* as well as a transfer of the property, and has such force as *the intent* of the legislature requires." (21 Wall., 62.) This is the doctrine, maintained by the Attorney-General, and from which he deduces, as a necessary corollary, the following: that whether the breach of a condition subsequent in such a grant *ipso facto* avoids the title of the grantee, without anything further to be done on the part of the grantor, or whether it merely renders such title voidable and liable to be defeated *thereafter* at the election of the grantor, to be manifested by some act of the latter, is purely a question of interpretation of the particular provision containing the grant; in other words, the question depends altogether upon the legislative will as expressed in the statute, and not upon the rule of the common law applicable to conditions of that sort.

DISTRICT OF COLUMBIA 3.65 BONDS.

The act of June 20, 1874, chap. 337, confers no power upon the sinking-fund commissioners of the District of Columbia, either directly or indirectly, to make the principal and interest of the 3.65 bonds, which they are thereby authorized to issue, payable in coin, by expressing on the face of the bonds that the principal and interest thereof will be paid in coin.

Their duty, as to the preparation of the bonds, will be discharged in entire conformity with the requirements of the statute, by making them payable in *dollars* simply, without introducing any qualification therein respecting the *kind of money* in which they are to be paid.

The intention of the act, manifestly, is that the principal and interest of such bonds shall be paid in whatever may constitute, when the payment is to be made, *lawful money* of the United States.

DEPARTMENT OF JUSTICE,

August 11, 1874.

SIR: I have the honor to state that I have considered the questions submitted by the sinking-fund commissioners of the District of Columbia in their communication to you dated the 22d ultimo, which, with the brief mentioned therein, you

District of Columbia 3.65 Bonds.

were pleased to refer to me on the 27th ultimo, in accordance with their request.

Those questions relate to the bonds which, by the 7th section of the act of June 20, 1874, it is made the duty of the sinking-fund commissioners of the District to cause to be prepared, and which they are authorized to exchange at par for like sums of certain indebtedness of the District referred to in that section; and the point seems to be, whether the principal and interest of these bonds are intended by the statute to be payable in *coin* or in *lawful money* of the United States.

In the first place, it is to be observed that the statute itself contains no specific directions on that point. It requires the commissioners "to cause *bonds of the District of Columbia* to be prepared in sums of fifty and five hundred dollars, bearing date August 1, 1874, payable fifty years after date, bearing interest at the rate of three and sixty-five hundredths per centum per annum, payable semi-annually," &c. Here, it is plain, no authority is conferred upon the commissioners, either directly or indirectly, to make the principal and interest of the bonds payable in coin, by expressing on their face that the principal and interest thereof will be paid in coin; and in the absence of such authority I conceive that it is not competent to them, in preparing the bonds, to make them so payable. Even in the case of *United States* bonds, it is well known that the practice of the Government, when issuing them, has been *not* to express upon their face that the principal and interest thereof will be paid in coin, unless the law authorizing their issue in positive terms provides that they shall be thus paid. On the other hand, the commissioners are not compelled to make, in a corresponding manner, the principal and interest of the bonds payable in lawful money or currency. In my opinion, their duty, as to the preparation of the bonds, will be discharged in entire conformity with the requirements of the law by making them payable in *dollars* simply, without introducing any qualification therein respecting the *kind of money* in which they are to be paid.

Supposing the bonds to be prepared without any such qualification, the inquiry now presents itself as to the *intention of the statute* in regard to the payment of the principal

District of Columbia 3.65 Bonds.

and interest thereof. So far as that intention may be gathered from the language of the law itself, the scope and purpose of the provision authorizing the issue of the bonds, and the peculiar facts and circumstances upon which the action of Congress in the premises was based, the only reasonable conclusion that can be deduced therefrom appears to my mind, after careful consideration of the subject, to be this : that such payment is not intended by the statute to be made solely and exclusively in coin, but, on the contrary, that it is thereby intended to be made in whatever now constitutes or shall at the time constitute lawful money of the United States.

Congress has pledged the faith of the United States to provide the revenue necessary for the payment of both the principal and interest of the bonds, by making proportional appropriations as contemplated in the act, and by causing taxes to be levied on the property of the District for that purpose. The proportional appropriations so to be made and the taxes so to be levied were unquestionably meant to be paid in such money as the Government ordinarily disburses in discharge of its indebtedness, and as it ordinarily receives in payment of its internal taxes; and the provision just referred to may, I think, be looked upon as indicating the character or kind of money in which Congress contemplated the principal and interest of the bonds to be paid.

The views on this subject presented in the brief which accompanied the communication of the commissioners are, in the main, founded on a supposed connection or identity, as to subject-matter, between the various acts of Congress heretofore passed providing for the issue of, or relating to, the securities or bonds of the *United States*, and the above-mentioned act authorizing the issue of "bonds of the *District of Columbia*." But it is very manifest that these acts cannot with propriety be regarded as in *pari materia*; and hence it would seem that the provisions of the former acts and the reasons for the interpretation given thereto touching the payment of the principal and interest of the bonds to which they refer are not adducible in explanation of the latter act, and cannot be legitimately invoked for the purpose

Case of Lieutenant A. H. Von Luettwitz.

of determining its meaning with respect to the payment of the principal and interest of the bonds therein named.

I am, sir, with great respect, your obedient servant,
GEO. H. WILLIAMS.

The PRESIDENT.

CASE OF LIEUTENANT A. H. VON LUETTWITZ.

Act of June 23, 1874, chap. 499, directing the Secretary of War "to amend the record of the said A. H. Von Luettwitz, so that he shall appear on the rolls and records of the Army for rank as if he had been continuously in service," construed.

It is the duty of the Secretary, under the act, to erase from the rolls and records any entry or statement showing that Von Luettwitz was cashiered; but this will not *ipso facto* restore the latter to the office from which he was dismissed.

Considering the intent of the act, however: *Advised* that the President is authorized thereby to immediately appoint Von Luettwitz a first lieutenant in the usual way, with pay to commence from the date of the act.

DEPARTMENT OF JUSTICE,

August 13, 1874.

SIR: I have the honor to acknowledge the receipt of your communication of the 7th instant, in which you ask for my construction of the following act of Congress:

"Whereas A. H. Von Luettwitz, late a first lieutenant in the Third United States Cavalry, who was cashiered from the United States service by sentence of a general court-martial on the 8th day of July, 1870, having established his innocence of the charges upon which he was so cashiered the United States service: Therefore

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of War be, and is hereby, directed to amend the record of the said A. H. Von Luettwitz, so that he shall appear on the rolls and records of the Army for rank as if he had been continuously in service: Provided, That nothing shall be paid to him for the interval of time from the 8th day of July, 1870, until the passage of this act."

I take it to be the duty of the Secretary of War, under this act, to erase from the rolls and records of the Army any entry or statement showing that Von Luettwitz was cashiered;

Case of Lieutenant A. H. Luettwitz.

but there is a grave question as to the legal effect of that action when taken. It is a fact that cannot be controverted, that Von Luettwitz is out of the Army as much as if he had never been in it. Congress refers to him as "a late first lieutenant," and declares that he was "cashiered from the United States service," &c. ; but the act in question seems to proceed upon the idea that the obliteration of the Army records, as therein provided for, will *ipso facto* restore Von Luettwitz to the office from which he was dismissed.

This idea is in conflict with the Constitution of the United States. Von Luettwitz, in pursuance of the sentence of a duly-organized court-martial, was discharged from the Army in 1870; and since that time his relations to it have been like those of any other private citizen. Any mistake by this tribunal, not involving its jurisdiction, does not affect the validity of its proceedings. Congress cannot annihilate a fact by causing the record-evidence of its existence to be destroyed; nor can Congress constitutionally appoint a private citizen a lieutenant, colonel, or general in the Army. The appointing power is vested by the Constitution "in the President, by and with the advice and consent of the Senate," except where it is vested by law in the courts or the heads of Departments.

Nothing is expressly directed or required in said act except that the rolls and records of the Army shall be altered so as to show that Von Luettwitz has been continuously in service; but the manifest intent of Congress was that Von Luettwitz should be restored to the rank which he formerly held in the Army, with pay to commence at the passage of the act. Congress could not have intended that a vacancy should occur in the ordinary way before this was done, as the act contemplates that he shall be at once in service and receive pay from the time of its passage.

Considering the meaning of this act, rather than what it says, and the duty of the Executive to execute as far as practicable the will of Congress, no matter how inapposite the words in which it is expressed, my opinion is that the act under consideration confers upon the President the power to appoint Von Luettwitz a first lieutenant in the usual way, with pay to commence from the 23d of June, 1874. I think,

Tonnage-Duties.

if he is so appointed, the commission should refer in a proper manner to the act by which the appointment is authorized.

I refer to the following authorities as bearing upon this subject: 4 Opin., 274, 306; 7 Opin., 98; 8 Opin., 223, 235; 13 Opin., 99, 209.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,

Secretary of War.

TONNAGE-DUTIES.

The Revised Statutes have made no change in the law respecting tonnage-duties upon vessels engaged in foreign commerce. The substance of that law is correctly expressed in the Treasury circular of June 6, 1874, and no reason is perceived for changing the directions therein given.

DEPARTMENT OF JUSTICE,

August 17, 1874.

SIR: In answer to the letter of Charles F. Conant, Acting Secretary, addressed to me August 8, 1874, I have first to observe that the Treasury circular inclosed in said letter, of date June 6, 1874, without doubt expresses correctly the essence of the law upon the matter in question as it stood prior to the enactment of the Revised Statutes; and the question now is, whether they have changed the law in respect to vessels "engaged in foreign commerce." I think they have not.

In the act of July 14, 1862, section 15, (14 Stat., 558,) the language employed is, all vessels "which shall be entered at any custom-house, from any foreign port or place, shall pay a tax or tonnage-duty," &c. No time or occasion when payment should be made is set forth except that indicated by the word "entered." Under this act it was held that tonnage was to be paid by vessels upon their *entry* at any custom-house, and (except such as came under the first proviso of said act) *as often as they entered*. The law stood thus (save that the exemption made in the first proviso was further extended) till the act of March 2, 1867, (14 Stat., 484,) by the 23d section of which vessels engaged in foreign commerce were

Cheyenne and Arapahoe Reservation.

required to pay tonnage "but once within one year," and after a payment it could not be collected again until the expiration of a year from the date of such payment. Under this law, also, it was held that tonnage was payable only upon the *entry* of vessels engaged in foreign commerce, and if a second entry did not occur for two, three, or more years, only the tonnage-tax of one year will be collectable upon such second entry.

Now, the Revised Statutes, in sections 4219 and 4223, copy exactly the language of the acts above cited in so far as it bears upon the point in question, and by all rules of interpretation the same construction should be given to the former as to the latter.

In my opinion, the case is governed by sections 4219 and 4223, Revised Statutes. A different class of vessels is indicated in section 4224, Revised Statutes, viz, those "which pay tonnage-duties once in a year," and a different rule for the payment of the same is given. This rule is in the exact language, and undoubtedly is a copy, of that prescribed in section 28 of the act of July 18, 1866, (14 Stat., 184,) and applies to classes of vessels therein pointed out, and, as I think, to no other.

I add, in conclusion, that I see no reason for changing the directions given in the Treasury circular of June 6, 1874.

I am, very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. B. H. BRISTOW,

Secretary of the Treasury.

CHEYENNE AND ARAPAHOE RESERVATION.

The *effect* of the stipulation contained in the 2d article of the treaty with the Cheyenne and Arapahoe Indian tribes of October 28, 1867, is to render it *unlawful* for any persons to enter or reside upon the reservation established by that treaty except those who are authorized so to do by the treaty, and except certain officers, agents, and employes of the Government.

Under the provisions of section 2149 of the Revised Statutes, the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, and also the superintendent of Indian affairs, Indian agents, and subagents, may remove from said reservation all persons found thereon contrary to law; and the President is authorized to direct the military force to be employed in effecting their removal.

Cheyenne and Arapahoe Reservation.

An order directing the military to be thus employed need not be issued by the President by his own hand ; it would be sufficient if issued by the Secretary of War.

DEPARTMENT OF JUSTICE,
September 1, 1874.

SIR : I had the honor to receive your communication of the 25th of June last, directing my attention to a letter addressed to you by the honorable Secretary of War, under date of the 22d of that month, upon the subject of the employment of troops in " the removal of outlaws, thieves, and other unauthorized parties " from the Cheyenne and Arapahoe reservation, and also to your letter in reply thereto, and requesting an expression of my views upon the same subject.

Before complying with your request, I desired to examine the recent revision of the statutes, inasmuch as that contains the latest manifestations of the legislative will touching the subject adverted to ; but, until within the past few days, I have been unable to do so for want of a copy of the revision. This will explain why an earlier response to your communication has not been made.

It appears that the above-mentioned reservation was established by a treaty made with the Cheyenne and Arapahoe tribes of Indians on the 28th of October, 1867, (see 15 Stat., 593,) which, I understand, is still in force. The 2d article of the treaty, after fixing the boundaries of the reservation, stipulates as follows : " And the United States now solemnly agrees that no persons except those herein authorized so to do, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians." The effect of this stipulation is to render it *unlawful* for any party to enter or reside upon the reservation who does not fall within some one of the exceptions contained therein.

By section 2149 of the Revised Statutes the Commissioner of Indian Affairs is authorized and required, with the approval of the Secretary of the Interior, to remove from any *tribal reservation* any person being therein without authority of

Cheyenne and Arapahoe Reservation.

law, or whose presence within the limits of the reservation may, in the judgment of the Commissioner, be detrimental to the peace and welfare of the Indians; and may employ for the purpose such force as may be necessary to enable the agent to effect the removal of such person."

And by section 2147 of the Revised Statutes the superintendent of Indian affairs, and the Indian agents and sub-agents, "shall have authority to remove from *Indian country* all persons found therein contrary to law; and the President is authorized to direct the military force to be employed in such removal."

There can be no doubt that these statutory provisions are applicable to the Cheyenne and Arapahoe reservation. And they unquestionably confer ample power upon the Commissioner of Indian Affairs, with the approval of the honorable Secretary of the Interior, and also upon the superintendent of Indian affairs, Indian agents, and subagents, to remove from that reservation persons such as those described in your communication; in effecting which object the President is, moreover, authorized to direct the military force to be employed.

I accordingly concur in the opinion already expressed by you, that an order of the Executive directing the military to be employed in removing from the said reservation all persons found thereon contrary to law, would be an adequate protection to the officers and soldiers who may, in conjunction with the agents or officers of the Indian Department, perform the particular service to which reference is made in the letter of the honorable Secretary of War and in your letter written in reply thereto. But I do not think it essential in this case that the order should be issued by the President by his own hand. If one were issued by the honorable Secretary of War, it would, as I conceive, be sufficient; the general rule being that the direction of the President is to be presumed in orders or instructions emanating from the appropriate Executive Department.

I am, sir, very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. C. DELANO,

Secretary of the Interior.

Remission of Fines, Penalties, and Forfeitures.

REMISSION OF FINES, PENALTIES, AND FORFEITURES.

Section 5293 of the Revised Statutes gives the Secretary of the Treasury power to remit fines, penalties, or forfeitures imposed by authority of any provision of law referred to in the first paragraph of that section, "*for imposing or collecting any duties or taxes,*" where the amount of the fine, penalty, or forfeiture does not exceed *one thousand dollars*, without the summary inquiry and statement of facts by a judge, as provided in section 5292 of the same statutes.

But if the fine, penalty, or forfeiture was imposed by authority of any provision of law referred to in the same paragraph, "*relating to registering, recording, enrolling, or licensing vessels,*" power is given the Secretary in the former section to remit the same, without the summary inquiry and statement mentioned, only where the amount does not exceed *fifty dollars*.

DEPARTMENT OF JUSTICE,

September 25, 1874.

SIR: Your communication of the 1st instant directs my attention to the first and fourth paragraphs of section 5293 of the Revised Statutes, and presents for my consideration the question whether you have power to remit fines, penalties, and forfeitures imposed under authority of the laws mentioned in the *first* paragraph of said section, where the amount of the fine, penalty, or forfeiture does not exceed one thousand dollars, and where there has been no summary inquiry and statement of facts by a judge, as provided for in section 5292 of the Revised Statutes.

Section 5293, or at least so much thereof as is material in connection with this question, reads as follows:

"The Secretary of the Treasury is authorized to prescribe such rules and modes of proceeding to ascertain the facts upon which an application for remission of a fine, penalty, or forfeiture is founded, as he deems proper, and, upon ascertaining them, to remit the fine, penalty, or forfeiture, if, in his opinion, it was incurred without willful negligence or fraud, in either of the following cases:

"First. If the fine, penalty, or forfeiture was imposed under authority of any provisions of law *for imposing or collecting any duties or taxes, or relating to registering, recording, enrolling, or licensing vessels*, and the amount does not exceed *fifty dollars*.

* * * * *

Remission of Fines, Penalties, and Forfeitures.

"Fourth. If the fine, penalty, or forfeiture was imposed under authority of *any revenue-law*, and the amount does not exceed *one thousand dollars*."

There can be no doubt that the terms "any revenue-law," employed in the *fourth* paragraph of section 5293, quoted above, are sufficiently comprehensive to include "laws for imposing or collecting duties or taxes" as mentioned in the *first* paragraph of the said section, which is also quoted above; and to that extent, certainly, the provisions of the latter paragraph may be taken to be within the scope of the former. So that in a case where the fine, penalty, or forfeiture was incurred under any law for imposing or collecting duties or taxes, and does not exceed one thousand dollars, the Secretary of the Treasury would seem to have power to remit the same *under said section*, notwithstanding the provisions of the first paragraph; since such a case comes clearly within the terms of the fourth paragraph, and *that* gives him authority to so remit where the amount of such fine, penalty, or forfeiture is not over a thousand dollars.

But in the first paragraph are also mentioned laws "relating to registering, recording, enrolling, or licensing vessels." These laws concern navigation. They do not strictly fall within the description, "any revenue-law," as used in the fourth paragraph; nor could they be regarded as falling within that description without rendering the first paragraph wholly inoperative. It appears to me, then, that if the fine, penalty, or forfeiture was imposed by virtue of any law relating to the *registering, recording, enrolling, or licensing* of vessels, the Secretary of the Treasury has power to remit the same *under section 5293* only in case the amount of such fine, penalty, or forfeiture does not exceed fifty dollars, the limit prescribed in the first paragraph thereof.

Accordingly, in answer to the question presented in your communication, I have the honor to state that, in my opinion, you have power to remit fines, penalties, or forfeitures imposed under authority of the laws mentioned in the first paragraph of section 5293, excepting such of those laws as relate to the registering, recording, enrolling, or licensing of vessels, in cases where the amount of the fine, penalty, or forfeiture does not exceed one thousand dollars, and where there has

National Banks.

been no summary inquiry and statement of facts by a judge, as provided for in section 5292 of the Revised Statutes; and that where the fine, penalty, or forfeiture was imposed under any of the laws above excepted you have power to remit the same, without the summary inquiry and statement provided for in section 5292, if the amount does not exceed fifty dollars, but not if it exceeds that sum.

I am, sir, very respectfully, your obedient servant,
GEO. H. WILLIAMS.

Hon. B. H. BRISTOW,
Secretary of the Treasury.

NATIONAL BANKS.

In the distribution of the \$55,000,000 of national-bank notes, as provided for by the act of June 20, 1874, chap. 343, the Comptroller of the Currency must rely on requisitions for the withdrawal and redemption of their notes by banks in States where there is an excess of circulation; this is his only resource under that act. Opinion on same subject, given July 15, 1874, (see *ante*, p. 415,) re-affirmed.

DEPARTMENT OF JUSTICE,
September 26, 1874.

SIR: I have the honor to acknowledge the receipt of your letter bearing date September 17, 1874, in which you request my opinion upon a question presented in a communication of the same date addressed to you by the Comptroller of the Currency, which I also received.

The Comptroller quotes in full the 7th and 9th sections of the act of Congress of June 20, 1874, entitled "An act fixing the amount of United States notes, providing for a redistribution of the national-bank currency, and for other purposes." He gives the present condition of the national-bank circulation, and states the probability "that a sufficient amount of the notes of banks which have on deposit with the Treasurer legal-tender notes will be redeemed to supply his office for a year to come with circulation for distribution to banks to be organized in the States which are deficient." He then asks, in substance and effect, whether he may use this currency which he has, or shortly will have, in hand, while it

National Banks.

lasts, and (until it shall be exhausted) refrain from making the requisitions directed by the 7th section of the act for the purpose of "filling" applications for national-bank notes coming from States and Territories having less than their due proportion of this circulation.

In my communication of the 15th of July last addressed to the Assistant Secretary, in answer to a letter from him, (see *ante*, p. 415,) I expressed the opinion that for the re-distribution to the extent of \$55,000,000 of national-bank notes as provided for by the act, the Comptroller of the Currency must, under this law, rely on requisitions for the withdrawal and redemption of their notes by banks in those States where there is an excess of such circulation, and that *this is his only resource*. I think so still. I cannot otherwise construe the language of the statute.

It is apparent, on reading the 4th section and the last clause of the 8th section of the act, that Congress had in view an amount, greater or less, of circulating-notes which would, under those sections, be redeemed by banks desiring to withdraw their circulation in whole or in part, and by banks going into liquidation, voluntary or compulsory. It may be that it was not contemplated that this fund would be so considerable as it is already. It is certain that there is no reference to it when Congress comes to make provision for the demands of banking associations from the deficient States and Territories. But it is plainly and peremptorily ordered that requisitions shall be made for this purpose upon each of the national banks "described in said section," *i. e.*, in section 6 of the act of July 12, 1870, (16 Stat., 251,) "and in the manner therein provided." The source of supply is thus (in the 7th section) clearly pointed out, and the Comptroller is required to "proceed forthwith * * * from time to time, as applications are duly made," to draw upon it for the needed circulation. There is no mention made in the act of any other source of supply.

The 9th section requires the Comptroller, "from and after the passage of the act, without delay, as applications therefor are made, to issue circulating-notes not to exceed the sum of \$55,000,000," &c. And it is provided "that such circulation shall be withdrawn and redeemed as it shall be necessary to

National Banks.

supply the circulation *previously* issued," &c. In this proviso the order to withdraw and redeem is *repeated*, but requisitions for such withdrawal and redemption are to be made only at such times and for such quantities of the currency as are necessary to equal and replace the issues already made. And here the act clearly indicates the *order* of proceeding. As applications are *duly* made for circulating notes—that is, the banks having filed their bonds and otherwise complied with the requirements of the law—the Comptroller is to issue and deliver the notes to them, and *then* is to "proceed forthwith" to make requisitions upon the banks pointed out by the act to withdraw and redeem of their circulation so much as is necessary to equal the issues "*previously*" made.

It is probable that this course of proceeding would result, temporarily, in a greater amount than \$354,000,000 of circulating notes were it not for the sums withdrawn and redeemed under the 4th and 8th sections of the act. These sums are so large that there is little danger of overstepping the limit fixed by law. And it may be presumed that this condition of the national-bank circulation was in the legislative mind when it provided by this act that issues should precede redemptions.

I have thus for a second time examined this statute, and given what I think is the true construction of it. It is not conclusive evidence that a correct interpretation has been given to a legislative act, to find that the law-makers, in their deliberations upon the bill before it became a law, gave to it the same meaning; but it is supporting and persuasive evidence. I therefore cite the observations of Mr. Sherman, chairman of the Senate Committee on Finance, in his colloquy with Senators Morton, Howe, and Logan, explaining the bill the day after it was reported to the Senate from that committee—particularly this remark in answer to a question from Mr. Howe: "As new banks are organized under the provisions of this act, the Comptroller, having the list of the banks affected by the provision before him, makes a requisition from time to time—requires them to surrender their circulating notes, *in exact proportion* as he goes on to organize new banks." He then said, in reply to Mr. Logan, that the measure applied to *existing* banks as well. He had previously remarked, in

Internal Revenue.

substance, replying to Mr. Morton, that the provision for the issue of circulating-notes was mandatory, and, "first of all," to take effect from and after the passage of the act—in one word, that issues were to precede requisition. But the passage is too long to quote. The debate is to be found on page 10 of "The Congressional Record" for February 5, 1874.

I am, very respectfully, your obedient servant,
GEO. H. WILLIAMS.

Hon. B. H. BRISTOW,
Secretary of the Treasury.

INTERNAL REVENUE.

The tax imposed by the internal-revenue act of June 30, 1864, chap. 173, as amended by the act of July 13, 1866, chap. 184, on the articles enumerated in Schedule C, is payable as well upon the removal of such articles for consumption without sale as upon the removal thereof for sale.

DEPARTMENT OF JUSTICE,
October 8, 1874.

SIR: I had the honor on the 29th ultimo to receive from Hon. Charles P. Conant, Acting Secretary, a letter dated the 26th of September, inclosing a copy of the communication, dated the 12th of the same month, addressed to you by the Commissioner of Internal Revenue.

My opinion is desired upon the question propounded by the Commissioner, which, in substance, is as follows: Whether the tax imposed by the internal-revenue act of June 30, 1864, as amended by the act of July 13, 1866, upon articles enumerated in Schedule C, must be paid upon their removal for sale in the United States, and also upon their removal for consumption without sale. (13 Stat., 301, 302.)

The ruling of the Internal-Revenue Office heretofore has affirmed the proposition, upon the ground that the word "and" is to be construed as meaning "or" where it occurs between the words "consumption" and "sale" in said schedule. I concur in this ruling, but do not consider it necessary for that purpose to wrest from the particle "and" its ordinary use in order to carry out fully the object of the provision and to make it comport with the general tenor of the internal-revenue laws.

Internal Revenue.

A common use of the word "*and*" (as common as any) is to enumerate, or bring together, in one sentence or clause two or more distinct and separate subjects, of each of which the same thing is predicated; or any number of distinct predicates under one subject. Thus, to say that steam *and* electricity are destructive agents, is not to say that they are so in conjunction, but that each is by itself. Or suppose that in this schedule, instead of a comma after each of the articles enumerated as objects of taxation, it read thus: For and upon every packet *and* box *and* bottle, and so on, repeating the particle after each article, it would be absurd to say that the articles must be lumped together, one of each, before they can be taxed. Again, suppose a clause stood thus: "or removed for consumption" and distribution and "sale"; could it be claimed that the three conditions must exist together before the liability to taxation can attach?

Consumption and sale have no necessary immediate connection. Sales are made to sell again, for transportation, for many other purposes, before consumption; and the words are not conjoined in the clause under discussion in any such sense as that the conditions signified by them must *co-exist*; or that either need exist at all, the other being present, in order that the article may be taxed. The particle "*and*" connects the two distinct and separate conditions, and indicates that upon the removal of the goods for consumption, as well as for sale, the tax attaches.

Assuming that, to bring the articles enumerated, upon their *removal*, within the proviso of the act, it must be both for consumption and sale, in that case it is of no consequence which of these reasons for removal is wanting; the absence of either relieves the articles from liability; the proprietor or manufacturer may remove his goods for the purpose of sale *only*, and he avoids the tax. Or, if that be too unreasonable, and it should be said that the liability to taxation attaches to the articles upon their removal for *sale* in all cases, but upon their removal for *consumption* only when they are to be sold for that purpose, then the whole law is simply this: that the tax must be paid upon the sale of the goods and upon their removal for sale, no matter for what purpose the sale is made.

Internal Revenue.

To give the statute this meaning would be to make useless and impertinent the word "consumption." But it is an established rule in the interpretation of statutes that to every word its natural force and meaning in the connection where it occurs should be given; and each clause should be made to harmonize with the general purpose and tenor of the whole act. While the construction adopted brings out the obvious sense of the clause in question, it agrees with the general purport of the internal-revenue laws, and particularly with sections 165 and 167 of the act of June 30, 1864, (13 Stat., 296; Rev. Stat., sections 3430-3432.) The Commissioner cites also the former law relative to manufactures, the sections now in force in relation to distilled spirits, to fermented liquors, tobacco and snuff, and to cigars. In all these cases the tax is required to be paid upon removal for *consumption* as well as for sale.

What possible reason can be given for the exemption from taxation of medical nostrums, cosmetics, and playing-cards, when given away as samples, or in compliment, or otherwise, which would not be equally sound in the case of tobacco, snuff, cigars, and whisky? The only exception to the general course of legislation in this matter is section 5 of the act of March 2, 1867, (14 Stat., 472; Rev. Stat., section 3437.) This law provides that in case the manufacturers of articles required by law to be stamped *sell them, or remove them for sale*, without affixing to them the proper stamp, they shall, in addition to the penalties imposed for such sale and removal, pay the taxes upon the goods as estimated by the Commissioner of Internal Revenue. The word *consumption* is omitted. The just inference to be drawn from such omission is, that it was considered in regard to the articles enumerated in Schedule C that the penalties imposed by other sections of the law, and especially by section 167 of the act of 1864, for failing to stamp them when removed for consumption only, would be sufficient to deter manufacturers and proprietors from the practice, and be adequate to protect the revenue.

I am, sir, very respectfully, your obedient servant,
GEO. H. WILLIAMS.

Hon. B. H. BRISTOW,
Secretary of the Treasury.

Removal of Capital of Montana Territory.

REMOVAL OF CAPITAL OF MONTANA TERRITORY.

Under an act of the legislature of Montana Territory of February 11, 1874, providing for the submission to the qualified voters there of the question as to a change of the territorial seat of government from Virginia City to Helena, an election was held on the 3d of August following, the returns of which, according to the official canvass of the votes, (which was required to be made by the secretary and marshal of the Territory, in the presence of the governor,) showed a majority against the change. Application having subsequently been made for a recanvass of the votes: *Held* that, whether the secretary and marshal together might, or might not, under the particular circumstances of the case, recanvass the votes, (on which no opinion is expressed,) a recanvass made by one of those officers alone, as was proposed, would not satisfy the requirements of the act mentioned; *yet, held further*, that the legal questions involved—either as regards the discharge of the duties of the canvassing-officers, the validity of the canvass of the votes as made and certified by them, or the final ascertainment of the fact whether a majority of the votes cast was in favor of or against the removal of the capital—are of purely local concern, in which the General Government is not interested, and over which its Departments have no jurisdiction or control.

Such questions may, by appropriate proceedings, be brought before the courts of the Territory, to which their determination rightfully belongs.

DEPARTMENT OF JUSTICE,

October 8, 1874.

SIR: I have the honor to acknowledge the receipt of your letter of the 1st instant, inclosing a communication from the governor of Montana Territory, and other papers, in relation to the canvass of the votes given at an election recently held in that Territory upon the question as to the proposed change of the territorial seat of government from Virginia City to Helena.

By an act of the territorial legislature, approved February 11, 1874, provision was made for the submission of the said question to the qualified voters of the Territory at the next general election, which was held on the 3d of August last. The act also provided that the votes should be "cast, counted, canvassed, and returned in the same manner, and by the same persons and officers, and in the same form and way," as the vote for Delegate in Congress. Under this provision, as it would seem, the returns of the votes given in

Removal of Capital of Montana Territory.

the different townships or precincts of each county were required to be delivered to the board of county commissioners; the latter were then required to open the returns and make an abstract of the votes; the clerk of the board immediately after the making out of the abstract was required to make a copy of the abstract and send it to the secretary of the Territory, whereupon it became "the duty of the secretary of the Territory with the marshal of the Territory, or his deputy, in the presence of the governor, to proceed, within thirty days after the election, and sooner if the returns be received, to canvass the vote given." And in case it should appear upon return and final count of the votes that a majority of them was in favor of the change of the seat of government, then, by another provision of the said act, the seat of government was to be deemed and held to be removed to Helena, and the governor was required to make public proclamation to that effect.

It appears that on the 2d of September both the secretary and the marshal of the Territory met for the purpose of canvassing the returns as received by the former, and did on that day, in the presence of the governor, canvass the votes; after which, having certified the result of the election, they adjourned. According to the canvass so made, there was a majority against the change of the seat of government.

Application was subsequently made to the secretary and marshal for a recanvass of the votes on the ground that the vote of one of the counties (Meagher County) had been, as is alleged, incorrectly returned; that the true vote of that county was just the reverse of what had been returned, and, if counted, would so far affect the result of the election as to throw the majority in favor of the change of the seat of government. But the secretary of the Territory thinks that their functions as canvassers of the votes given in said election have ceased; that, after making one canvass, certifying the result thereof, and adjourning, it is not competent to them to meet again and make another count. The marshal of the Territory, however, being of the opposite opinion, the governor is urged to act upon a recanvass made, or to be made, by the marshal alone, and issue a proclamation based on the result of *such* recanvass.

Removal of Capital of Montana Territory.

Upon substantially this state of facts, the governor, in his communication to you, requests instructions from your Department as to the course *he* should pursue; and, in your letter to me, you ask for an expression of my views upon the legal questions involved in the subject of his request.

It seems to me that, so far as the governor is concerned, the case is a very simple one. Whether the secretary and marshal together might or might not have legally recanvassed the votes under the circumstances mentioned, is a question upon which I do not think it necessary or proper for me to express an opinion. But it is very plain that a recanvass of the vote, if made by one of those officers alone, would not suffice under the requirements of the local-election law, and consequently that the governor would not be legally authorized to issue a proclamation based on a recanvass which the marshal may have made by himself.

I have to add, however, with respect to the legal questions involved in this matter—either as regards the discharge of the duties of the canvassing-officers, or the validity of the canvass of the votes as made and certified by them, or the final ascertainment of the fact whether a majority of the votes cast was in favor of or against the change of the seat of government—that they are of purely local concern, in which the General Government is not interested, and over which its Departments have no jurisdiction or control. They may, by appropriate proceedings, be brought before the courts of the Territory, to which their determination properly belongs.

My predecessors have frequently declined to give official opinions upon questions similar to those presented by the communication of the governor of Montana, and their action in respect thereto I approve. (See 2 Opin., 311; 6 Opin., 334; 10 Opin., 220.)

Very respectfully,

GEO. H. WILLIAMS.

Hon. B. R. COWEN,

Acting Secretary of the Interior.

District of Columbia—Auditor's Certificates.

DISTRICT OF COLUMBIA—AUDITOR'S CERTIFICATES.

The First and Second Comptrollers of the Treasury, sitting as a board of audit under the act of June 20, 1874, chap. 337, are, by the provisions of that act, authorized to allow interest at the rate of six per centum per annum upon that part of the indebtedness of the District of Columbia which purports "to be evidenced and ascertained by certificates of the auditor of the board of public works" of said District.

DEPARTMENT OF JUSTICE,
October 17, 1874.

SIR: I have the honor to acknowledge the receipt of your letter, bearing date October 10, 1874, inclosing one of the 9th addressed to you by the First and Second Comptrollers, and requesting my opinion upon the question presented by those officers, viz, whether they, sitting as a board of audit under the act of Congress "for the government of the District of Columbia," approved June 20, 1874, should allow interest on that portion of the debt of said District purporting to be evidenced by certain certificates signed by the auditor of the late board of public works.

I find, in the inclosure with your letter, a copy of one of these certificates, showing their form and tenor. I notice your suggestion that the interest of the United States will be affected by the determination of the question. It may so happen. Nevertheless it is not a debt or claim against the United States that the Comptrollers are called on to examine. If Congress has enacted a law by which, in some contingency, near or remote, the United States may be obliged to pay the debt of another government, I do not see that the nature or condition of that debt can in any way be changed or modified by such liability. If the debt bears interest it must be taken *cum onere*.

The indebtedness to be audited is that of the District of Columbia, for the payment of which Congress has made provision, and has determined that its status shall be accurately ascertained. The act above referred to describes the class of the floating debts of the District to which the above-mentioned certificates belong, thus: "Secondly, the debt purporting to be evidenced and ascertained by certificates of the auditor of the board of public works." Whether it is lawful

District of Columbia—Auditor's Certificates.

and right for the *District* to pay interest upon these certificates, is, as I understand it, the question submitted.

The case seems to be this: The board of public works, having entire control over the streets, avenues, alleys, and sewers of the cities of Washington and Georgetown, ordered improvements of streets, &c., to be made, and contracted with sundry persons to do the work. Under the same section of the law the board has also power to disburse upon their warrant all moneys appropriated, in pursuance of law, for improvements. (Section 37 of the act of February 21, 1871, 16 Stat., 426.) From the powers thus granted there is necessarily inferred the authority to audit and settle the accounts of contractors and other employés of the board. This duty was imposed upon an officer appointed by the board, styled the auditor of the board of public works. He represented the board, and in the examination, settlement, and allowance of accounts his action was theirs. When the funds of the board became exhausted and the amounts found due to the contractors, upon settlement, could not be paid, the auditor gave to them, (doubtless by order of the board,) as evidences of such settlements, certificates signed by him as auditor, in which it was stated that he had audited and *allowed* the accounts, and the amounts allowed were distinctly given.

These amounts, as shown by the auditor's certificates, thus became *liquidated* debts, due at the respective dates of the certificates; and there being no question raised as to the legality of the contracts under which they were incurred, they are debts of the District of Columbia.

I am of opinion that interest is chargeable on these certificates from and after their dates, because they are evidences of indebtedness ascertained and liquidated by the debtor at the times they bear date. They are acknowledgments by the debtor that the amounts shown by them were due at date. But payment was declined. The law in such cases implies a contract to pay interest. Interest becomes a part of the debt, as obligatory upon the debtor as the principal. In *Boddam vs. Riley* (2 Bro. C. C., 3) Lord Thurlow said, "When there are accounts regularly stated between the parties, there is an implied contract on the part of the debtor to pay; and all contracts to pay undoubtedly give a right to interest from the time when the principal ought to be paid." And Mr.

District of Columbia—Auditor's Certificates.

Justice Spéncer said, in *Walden vs. Sherburne*, (15 Johns., 424,) "We have uniformly decided, that after an account has been liquidated it carries interest; and that an account is to be considered liquidated after it is rendered, if objections are not made to it." (See, also, Ch. J. Savage's decision in *Reid vs. The Rensselaer Glass Factory*, 3 Cowen, 393.) Mr. Sedgwick, in his work on Damages, well sums up the law on this subject as it is held in America, in a note at the foot of page 383, thus: "The law in this country annexes interest as an invariable incident in all cases of default to pay the principal sum, where the debtor knows what that sum is and when he is to pay it."

These authorities will probably suffice to show what the law on this subject is in the case of individuals and corporations. It is not different in respect to States and territorial governments. A State cannot be sued by a citizen, but when questions of public indebtedness come incidentally before the judicial tribunals they do not hesitate to dispose of them upon the same legal and equitable principles as in the case of individuals. The State is liable to pay interest as individuals are. (*Respublica vs. Mitchell*, 2 Dallas, 101; *Commissioners vs. Kempshall*, 26 Wend., 404; *People vs. Canal Commissioners*, 5 Denio, 401; 2 Mason C. U. Rep., 1.)

Congress, in requiring the Comptrollers of the Treasury to examine and audit the floating debt of the District of Columbia, has limited them in the performance of this duty by no rules in respect to interest, other than those which would apply to the debts of individuals, corporations, and States; and it is fairly to be inferred that it is the intent of the act that they should be governed by those rules. Moreover, section 1 of the act of April 27, 1870, (16 Stat., 91,) entitled "An act to amend the usury laws of the District of Columbia," provides that for the loan or forbearance of any money, goods, or things in action, the rate of interest shall be six per cent. per annum; and there seems to be no good reason why this act should not apply to the liquidated and overdue indebtedness of the late board of public works.

I am, very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. B. H. BRISTOW,

Secretary of the Treasury.

Norse American Line of Steamers.

NORSE AMERICAN LINE OF STEAMERS.

By virtue of the 2d article of the treaty with Sweden of April 3, 1783, and the 8th and 17th articles of the treaty with Sweden and Norway of July 24, 1827, the provisions of article 4 of the treaty with Belgium of July 17, 1858, exempting steam-vessels of the United States and of Belgium, engaged in regular navigation between their respective countries, from the payment of duties of tonnage, anchorage, buoys, and light-houses, became immediately applicable, *mutatis mutandis*, to steam-navigation between the United States and Sweden and Norway.

Hence, since the 17th of July, 1858, the steamers of the Norse American line, (being Swedish and Norwegian vessels,) plying regularly between Norway and the United States, have not been liable to the payment of the above-mentioned duties at American ports; and the owners thereof are entitled to have refunded to them any moneys they have paid to the customs-officers of the United States for such duties subsequent to that date.

Under sections 3012½ and 3013 of the Revised Statutes, the Secretary of the Treasury has authority to refund to the owners such moneys, where the payments by them to the customs-officers were exacted since the 30th of June, 1864. Where the payments were exacted prior to that date, whether these can be refunded in like manner depends upon the law as it then stood, and the practice of the Treasury Department; section 2 of the act of March 3, 1839, chap. 82, being applicable thereto.

DEPARTMENT OF JUSTICE,
October 24, 1874.

SIR: I have the honor to acknowledge the receipt of a letter, bearing date October 5, 1874, addressed by Hon. Charles F. Conant, Acting Secretary, to this Department, and covering copies of communications from the Secretary of State addressed to the Department of the Treasury, under dates 10th of April and 31st of August, 1874; also, a copy of the letter of the Secretary of the Treasury, of October 3, 1874, addressed to the Department of State; also, the note, bearing date March 25, 1874, of the minister of Sweden and Norway, addressed to the Department of State; and lastly, a memorandum containing a copy of article 4 of the treaty of July 17, 1858, between the United States and Belgium; of article 2 of the treaty of the United States with Sweden of April 3, 1783; and of articles 8 and 17 of the treaty of the United States with Sweden and Norway of July 4, 1827.

These documents all have reference to the question sub-

Norse American Line of Steamers.

mitted by the letter of the Treasury Department of the 5th instant, viz: Whether the owners of the "Norse American line" of steamers plying between Norway and the United States "*are entitled to a refund*" of the moneys they have paid to the customs-officers of the United States for duties of tonnage, buoys, and light-houses, which moneys the government of Norway and Sweden claims, through their minister, in his note of March 25, 1874, were exacted and paid contrary to certain stipulations contained in the treaties with Sweden and Sweden and Norway above referred to. Secondly, it is inquired whether the Secretary of the Treasury, under sections 3012½ and 3013 of the Revised Statutes, has the power to refund these moneys.

By article 2 of the treaty with Sweden of April 3, 1783, the King of Sweden and the United States engaged, mutually, not to grant thereafter any particular favor to other nations in respect to commerce and navigation which shall not *immediately become common* to the other party, &c. (8 Stat., 62.) This agreement, by the 17th article of the treaty of July 4, 1827, with Sweden and *Norway*, was revised and made applicable to all the countries under the dominion at that time of the two contracting powers, and it was declared to have the same force and value as if inserted in the text of the later treaty. (8 Stat., 354.) By article 8 of the treaty last cited, the contracting parties engage not to impose upon the navigation between their respective territories, in the vessels of either, any tonnage or other duties, of any kind or denomination, which *shall be higher or other than* those which shall be imposed on every other navigation except that which they have reserved to themselves by the sixth article of the present treaty. (8 Stat., 350.) The sixth article refers only to coast-wise navigation, and that between the ports of Sweden and those of Norway. (8 Stat., 348.) These mutual agreements, it is stated by the honorable Secretary of State, still exist, and are in force, and no doubt have been in force since the year 1827.

By article 4 of the treaty between the United States and Belgium of July 17, 1858, it was stipulated that steam-vessels of the United States and of Belgium, engaged in regular navigation between their respective countries, shall be ex-

Norse American Line of Steamers.

empt from the payment of duties of tonnage, anchorage, buoys, and light-houses. (12 Stat., 1045.)

From the simple reading of these treaty provisions in the order above set forth, the conclusion is inevitable, that whatever favors or exemptions are enjoyed by the regular steam-navigation of Belgium plying between that country and the United States, are "common" to the like navigation of Sweden and Norway. For "no higher or other duties" can be imposed upon it in the ports of the United States than are imposed on every other navigation. The Departments of State and of the Treasury concede that the claim of this Norse line of steam-vessels to be exempt in the ports of the United States from the payment of duties of tonnage, &c., is just and reasonable, and they are brought to this concession by an examination and review of the treaty provisions above set forth. But if it is just and reasonable, *now and in the future*, that steam-vessels of Sweden and Norway, engaged in regular navigation between those countries and the United States, should be exempt, in the ports of the latter, from the payment of tonnage-duties, it has been so at *all times in the past*, since the ratification of the treaty with Belgium of July 17, 1858. No language can make this plainer than it is upon the face of the treaties.

It is stated by the honorable Secretary of State that as yet there has been no line of steam-vessels of the United States engaged in regular navigation between the United States and Sweden or Norway. It cannot, therefore, be certainly stated whether tonnage-duties would or would not be required of such vessels belonging to this country, in the ports of Sweden and Norway. It is to be presumed that they will, when the occasion shall arise, faithfully perform their duty under the treaties; for the obligations imposed by them are reciprocal. But either of the contracting parties may claim the benefit of them, even if the other should never inaugurate regular steam-navigation between the two nations.

It results from what has been said that the moneys which have been paid for duties of "tonnage, anchorage, buoys, and light-houses" by the "Norse American line" of steamers to the customs-officers of the United States have been exacted contrary to the stipulations of the treaties above set forth—con-

Norse American Line of Steamers.

trary, therefore, to law. The amounts in the Treasury so collected are not the moneys of the United States, but belong to the owners of the said line of steamers. It is money had and received to their use, and they are entitled to have it refunded to them.

I pass now to the second inquiry. Section 3012½ of the Revised Statutes provides, in substance, that when, to the satisfaction of the Secretary of the Treasury, it shall appear that more money has been paid to the customs-officers of the Government than the law requires for duties, or other moneys, and protest and appeal to the Secretary has been made as required by law, he may refund the overplus, &c.

The facts of the case under consideration, in respect to overpayment, not only answer to the conditions set forth in the law, but go far beyond them. The language of the law implies that money is due to the Government in the case provided for, and that there is an overpayment. Here nothing was due. But I think the plain intent of the law is, that whenever money has been collected by the customs-officers of the Government that does not by law belong to it, and the appeal required by the statute has been made to the Secretary, he shall refund to the party whose money has been taken without warrant of law. It would be monstrous to hold that the Secretary may make restitution when a *part* only was unlawfully received, but cannot where the *whole* was exacted against law.

Section 3013 provides for the case of failure to comply with the requirements of the statute relative to the protest and appeal to the Secretary of the Treasury when that functionary is satisfied that such non-compliance is owing to circumstances beyond the control of the owner, master, consignee, or agent. In other respects it is substantially like the preceding section. The language is certainly broad enough to cover the cases supposed, viz, "cases in which, in the opinion of the Secretary of the Treasury, circumstances have rendered it impossible for the consignee or agent of the line to protest and appeal."

I am of opinion that, in the case as stated, it will not be overstepping the limit of the powers given by these provisions of law to the Secretary of the Treasury if he shall refund

Norse American Line of Steamers.

to the owners of the "Norse American line" of steamers the moneys exacted from them as "duties of tonnage, buoys, and light-houses" contrary to the aforesaid treaty stipulations.

It remains to inquire how far back the operation of these laws extends. Section 3012½ is a re-enactment of section 16 of the act of June 30, 1864, (13 Stat., 215,) and section 3013 of the 7th section of the act of July 28, 1866, (14 Stat., 329.) The law as declared in section 3012½ has been in operation certainly since June 30, 1864. In respect to tonnage-duties it does not, I think, reach beyond that time in the past. Section 16 of the act of 1864 (identical with section 3012½ Rev. Stat.) speaks of duties paid under protest and appeal "as hereinbefore provided;" that is, in sections 14 and 15 of the same act. Section 14 (13 Stat., 215) provides that "in the case of duties levied on *tonnage*," (as well as on goods, wares, and merchandise,) unless the owner, master, commander, or consignee of the vessel "shall within *ten* days after the ascertainment and liquidation of the duties by the proper officers of the customs give notice, in writing, to the collector of objection to his decision, and within *thirty* days after the date of such ascertainment and liquidation appeal to the Secretary of the Treasury," the decision of the collector shall be final and conclusive. The section of the Revised Statutes corresponding to this is section 2931. There is no like statute, in respect to *tonnage*-duties prior to June 30, 1864. There is a similar law in case of goods, wares, and merchandise, to wit, section 5 of the act of March 3, 1857, (11 Stat., 195.)

It will be observed that the operation of section 3012½ is dependent upon the condition that there should be notice in writing to the collector of objection to his decision within ten days after it is made, and an appeal to the Secretary of the Treasury within thirty days after the date of such decision, and there is no like requirement in the case of tonnage-duties prior to the 30th of June, 1864. It follows that said section cannot reach back in its effect beyond that date, so far as it concerns duties on tonnage.

It is hardly necessary to add that the same rule holds in regard to the operation of section 3013; for there could not be a failure "to comply with the requirements relating to appeals to the Secretary of the Treasury" before there were any such requirements.

Freedmen's Bureau—Generals Howard and Balloch.

As to duties of tonnage overpaid, or exacted contrary to law, prior to June 30, 1864, the question whether they can be refunded depends upon the law as it was before that date and the practice of the Treasury Department. The law of March 3, 1839, section 2, is applicable thereto, (5 Stat., 348.)

I have the honor to be, very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. B. H. BRISTOW,
Secretary of the Treasury.

FREEDMEN'S BUREAU—GENERALS HOWARD AND BALLOCH.

The resolution of March 29, 1867, [No. 25,] was passed for the protection of a particular class of claimants described therein; its specific object being to more effectually secure to such claimants, through the instrumentality of the Freedmen's Bureau, the money due them from the Government, in cases where claims were prosecuted in their behalf by agents or attorneys.

To enable the Freedmen's Bureau to discharge the duty thereby devolved upon it, the checks and certificates issued at the Treasury on the settlement of such claims were required by the resolution to be made payable to the Commissioner of the Bureau.

The money drawn from the Treasury by the Commissioner upon those checks and certificates was *public money*, and retained that character while it remained in his hands, or until disbursed by him or his subordinates as directed in the resolution.

By the provisions of the 3d section of the resolution the Commissioner and those of his subordinates who were charged with the duty of paying out this money to the parties entitled to receive it, were subjected, in respect of the custody and disbursement of such money, to the same degree of responsibility and accountability to which a disbursing-officer of the Army was subject in respect of the public money in his hands.

Therefore, the investment in Government securities of the public money in their hands, made by the Commissioner and the chief disbursing-officer of the Bureau, rendered them liable to severe penalties imposed by the acts of August 6, 1846, chap. 90, and June 14, 1866, chap. 122, and to be criminally prosecuted therefor under these acts.

But though such investment was prohibited by the statutes last referred to, the profits derived therefrom in the shape of interest and premium inured solely to the United States; they were public money, and should have been accounted for by those officers the same as other public money. Neither of them could legally apply these profits to re-imbursing himself for erroneous or double payments made to claimants, or to paying employés of the Bureau extra compensation, &c.

Freedmen's Bureau—Generals Howard and Balloch.

The approval by the Second Comptroller of the application of the public money to the purposes just mentioned is no protection to the Commissioner and chief disbursing-officer of the Bureau, unless such approval was given by the Comptroller while officially passing on their accounts; in which case the action of the Comptroller would be conclusive until such accounts are re-opened or the settlement thereof set aside on some valid ground, such as fraud, mistake, &c.

Those officers, notwithstanding a criminal prosecution against them on account of the aforesaid investment may now be barred by the limitations of the statute, remain civilly liable for so much of the public money received by them as has not been lawfully accounted for.

DEPARTMENT OF JUSTICE,*October 24, 1874.*

SIR: I have examined the papers which accompanied your communication of the 16th ultimo, relative to certain transactions of General O. O. Howard, late Commissioner of the Freedmen's Bureau, and of General George W. Balloch, late chief disbursing-officer of that Bureau; and I now proceed to answer the questions propounded by you in that communication.

The transactions referred to are, the investment in United States bonds of moneys received by those officers from the Treasury, under the circumstances hereinafter stated, and the application of the profits derived from such investment to the purposes hereinafter mentioned.

The questions propounded to me are the following:

"1. Were Generals Howard and Balloch, or either of them, disbursing-officers of the United States within the meaning of the acts of March 3, 1857, June 14, 1866, and other acts herein cited, (among which are the act of August 6, 1846, and resolution of March 29, 1867;) and had they, or either of them, any lawful right thus to convert the money received by them into United States bonds?

"2. Had they, or either of them, a lawful right to expend, for any purpose whatever, the premium or interest arising therefrom; and, if so, have they any lawful right to reimburse themselves therefrom for any erroneous or double payments made to claimants without any fraudulent intent on the part of said officers, and after the usual precautions had been taken to verify the identity of such claimants; or to pay to employes of the Bureau any sums, on account of extra

Freedmen's Bureau—Generals Howard and Balloch.

compensation, from this or any other fund; and what legal effect has the approval of the Second Comptroller upon such re-imbursement or payment?

"3. If found that the conversion in question was unlawful, what form of civil or criminal prosecution ought to be and now can be instituted against either of these officers, especially General Balloch, for such violation of law, or to recover any portion of the interest which may be found due to the United States; and should the entire interest arising from these bonds be turned into the Treasury as a miscellaneous receipt without any abatement?"

The facts upon which these questions have arisen, so far as they seem to be material to the consideration of the points really involved, are as follows:

By the act of March 3, 1865, (13 Stat., 507,) there was established in the War Department, temporarily, a Bureau of Refugees, Freedmen and Abandoned Lands, (ordinarily called the Freedmen's Bureau,) to which was committed "the supervision and management of all abandoned lands, and the control of all subjects relating to refugees and freedmen from rebel States, or from any district of country within the territory embraced in the operations of the Army," under such rules and regulations as might be prescribed by the head of the Bureau and approved by the President. Provision was made for the appointment of a Commissioner, under whose control and management the Bureau was to be placed, and likewise for the appointment of a number of assistant commissioners; and the Secretary of War was authorized to assign to the Commissioner a certain number of clerks. But the act also provided that *any military officer might be detailed and assigned to duty thereunder*, without increase of pay or allowances.

On the 12th of May, 1865, an order was issued from the War Department, in which, by direction of the President, Major-General O. O. Howard was assigned to duty in that Department as Commissioner of said Bureau.

By a subsequent order issued from the War Department, dated June 6, 1865, Lieutenant-Colonel George W. Balloch, then chief commissary of the Twentieth Army Corps, was assigned to duty as inspector of the Subsistence Department, un-

Freedmen's Bureau—Generals Howard and Balloch.

der the act of March 3, 1865, entitled "An act for the better organization of the Subsistence Department," and by the same order he was directed to report in person to Major-General Howard, Commissioner of Refugees, Freedmen and Abandoned Lands.

On the 13th of June, 1865, an order was issued by General Howard, as such Commissioner, which announced that Lieutenant-Colonel George W. Balloch, commissary of subsistence, inspector of Subsistence Department, having been duly assigned by orders from the War Department, was on duty in said Bureau, and directed that he be respected accordingly.

Subsequently another order was issued by General Howard, dated "Bureau Refugees, Freedmen and Abandoned Lands, Washington, D. C., June 20, 1865," containing the following directions:

"Lieutenant-Colonel George W. Balloch, on duty as chief commissary and inspector of Subsistence Department of this Bureau, in connection with the duties of his office as here announced, will temporarily perform the duties of chief accounting and disbursing officer of this Bureau. He will keep a complete record of all funds accruing from every source connected with the Bureau, and of all expenditures in every department of the same."

By the 1st section of a resolution approved March 29, 1867, (15 Stat., 26,) Congress enacted, "That all checks and Treasury certificates to be issued in the settlement of claims for pay, bounty, prize-money, or other moneys due to colored soldiers or marines, or their legal representatives, now residing, or who may have resided, in any State in which slavery existed in the year 1860, the claim for which has been or may be prosecuted by an agent or attorney, shall be made payable to the Commissioner of the Freedmen's Bureau, who shall pay the said agent or attorney his lawful fees and expenses, and shall hold the balance subject to the order of the claimants on satisfactory identification," &c. The 2d section also enacted, "That the Commissioner of the Freedmen's Bureau shall be held responsible for the safe custody and faithful disbursement of the funds hereby intrusted to him." And by the 3d section it was further enacted, "*That all money*

Freedmen's Bureau—Generals Howard and Balloch.

held or disbursed under the provisions of this resolution shall be held and disbursed under the same rules and regulations governing other disbursing-officers of the Army."

Before the passage of that resolution, Congress had, by the act of July 16, 1866, (14 Stat., 173,) further continued in force, with some amendments not important in this connection, the aforesaid act of March 3, 1865, establishing temporarily the Freedmen's Bureau; and those acts were still further continued in force by the act of July 6, 1868, (15 Stat., 83,) except as therein modified. The latter act, in section 4, provided, "That officers of the Veteran Reserve Corps or of the volunteer service, now on duty in the Freedmen's Bureau as assistant commissioners, agents, medical officers, or in other capacities, who have been or may be mustered out of service, may be retained by the Commissioner, when the same shall be required for the proper execution of the laws, as officers of the Bureau, upon such duty and with the same pay, compensation, and all allowances from the date of their appointment, as now provided by law for their respective grades and duties at the dates of their muster-out and discharge," &c.

On the 1st of September, 1868, General Howard, acting in pursuance of the provisions of the enactment just quoted, issued an order retaining General Balloch (then about to be mustered out of service, and who in fact was next day mustered out, to take effect September 1, 1868) in the Freedmen's Bureau, as assigned to duty therein by the orders of June 6, 1865, and June 20, 1865, hereinbefore mentioned; and the latter thenceforth remained on duty in that Bureau, as chief disbursing-officer thereof, until some time in October, 1871, when he was finally relieved from duty and ceased to be an officer of the Bureau.

In the meantime considerable sums of money had been intrusted to the Commissioner of the Freedmen's Bureau, under the aforesaid resolution of March 27, 1867, for payment of the claims of colored soldiers, sailors, or marines, as provided in that resolution. Part of this money, amounting to about \$300,000, was invested by General Balloch, with the concurrence of General Howard, in United States securities, and the profits derived from the investment, in the shape of interest and premium, were applied to various purposes,

Freedmen's Bureau—Generals Howard and Balloch.

among which were the re-imbursement of General Balloch for claims paid to the wrong parties, the payment of extra compensation to employes of the Bureau, also the payment of accounts for stationery, printing, &c.

Concerning that investment, General Howard writes as follows, in a letter to the Secretary of the Treasury dated October 7, 1871: "After the funds for payment of certificates for bounty come into my hands, I first pay the attorney of record and the claimants as fast as I can; but often there is to the credit of my chief disbursing-officer quite a large sum. Upon consultation with, as I believed, the proper officers of your Department, I allow to be changed currency into United States securities."

One of the officers here referred to by General Howard is the Second Comptroller, who, in a report to the Secretary of the Treasury, dated the 10th of March, 1874, makes the following statement: "Early in 1870, I think about the last of January, General Howard called on me and said that funds had accumulated in his hands from these payments to him, (*i. e.*, payments made to him under the provisions of the resolution of March 29, 1867,) and wished to know if there was any legal or other objection to his investing the money while looking up the beneficiaries. My reply was, in substance, that the case was an anomalous one, but that there was no law which forbid the payee of an adjudicated or settled account from investing the proceeds, and that the laws in regard to investment of *public* funds by disbursing-officers, especially the acts of August 6, 1846, (9 Stat., 63,) and June 14, 1866, (14 Stat., 64,) did not apply in this case, and that he might legally and properly invest the money in United States bonds, deposit them in the Treasury, and account for the interest. I am of the same opinion now that I was then. General Howard informed me that he had consulted with General Spinner, who concurred in this view of the law and favored the investment."

To return to the questions submitted: These are understood to have reference to the sort of official relation sustained toward the Government by General Howard and General Balloch, while on duty in the Freedmen's Bureau, *especially with respect to the custody and disposition of the funds intrusted*

Freedmen's Bureau—Generals Howard and Balloch.

to them, or either of them, under the resolution of March 29, 1867; the rights, duties, and responsibilities which attached to or devolved upon them while sustaining such relation, by virtue of that and other enactments; the liabilities, civil or criminal, if any, which they incurred, growing out of the investment of those funds as above stated; and also to some other matters of minor importance, which it is deemed needless to particularly mention here.

It will be seen on referring to the statement of facts given above, that, at the time of the passage of the resolution of March 29, 1867, both General Howard and General Balloch were officers of the Freedmen's Bureau, having been constituted such by detail and assignment from the Army, under the provisions of the act of March 3, 1865, (the former being Commissioner of the Bureau, under whose control and management it was placed, while the latter, among other duties, was performing that of chief disbursing-officer of the Bureau, by direction of the Commissioner,) and that they both thenceforth remained in the Bureau, without any change in their respective positions or functions, during the period when the investment of the aforesaid funds took place.

That resolution was passed for the protection of a particular class of claimants, described therein. The specific object it had in view was, to more effectually secure to such claimants the money due them from the Government, in cases where claims were prosecuted in their behalf by agents or attorneys. This object it sought to accomplish through the agency of the Freedmen's Bureau, by requiring payment of the claims so prosecuted, in the event of an allowance thereof, to be made by that Bureau *directly to the claimants, or to their legal representatives, in current funds*, after first deducting and withholding the *lawful fees and expenses* of the agent or attorney, which were required to be paid over to the latter.

The mode of adjusting or settling these claims at the Treasury was left unchanged by the resolution. But to enable the Bureau to discharge the new duty which was devolved thereon, it required the checks and certificates issued at the Treasury on the adjustment or settlement of such claims (which had previously been made payable to the claimants themselves, and delivered to their agents) to be made payable

Freedmen's Bureau—Generals Howard and Balloch.

to the Commissioner; and upon these checks and certificates that officer drew from the Treasury the money with which to pay the claimants and their agents the amounts they were respectively entitled to.

Unquestionably, the money so drawn from the Treasury was *public money*, and it did not lose that character so long as it remained in the hands of the Commissioner, or until disbursed by him or his subordinates as directed in the resolution. The making the checks and certificates issued at the Treasury payable to him was only a method of administration adopted for placing such funds in his hands to be thus disbursed. The result would not have been different, in a legal point of view, had the same funds been placed there in any other way; as, for instance, by means of requisitions and warrants, according to the ordinary course. So that he could not, simply because those checks and certificates were made payable to him, be regarded in the light of a *mere payee* of the *claims* on settlement whereof such checks and certificates were issued, as the Second Comptroller seems to have viewed him.

With respect to these public funds, then, it is obvious that the Commissioner was by the said resolution made a disbursing-officer; and I think that those of his subordinates who were charged by him with the duty of paying out such funds to the parties entitled to receive them, and who for that purpose were put in possession thereof, sustained precisely the same relation to the Government, and were directly accountable to the latter for the performance of their trust; though *primarily* the Commissioner himself was by the 2d section of that enactment responsible for the "safe custody and faithful disbursement" of the funds. Furthermore, it is declared by the 3d section (as has already been shown) that "all money held or disbursed under the provisions of this resolution shall be held and disbursed under the same rules and regulations governing other disbursing-officers of the Army." The effect of this provision clearly was to subject both the Commissioner and his subordinates above referred to, as regards the custody and disbursement of such money, to the same laws and the same degree of responsibility and account-

Freedmen's Bureau—Generals Howard and Balloch.

ability to which a disbursing-officer of the Army was subject in respect of the public money in his hands.

Now, the acts of August 6, 1846, March 3, 1857, and June 14, 1866, mentioned or referred to in the first of the above questions, contain provisions applicable to disbursing-officers of the Army, and it is plain that, under some of those provisions, such officers would render themselves liable to severe penalties in case they converted the public money intrusted to them into bonds of the United States or anything else. (See section 16, act of August 6, 1846, and section 2, act of June 14, 1866.) To the extent that the provisions of those acts were applicable to disbursing-officers of the Army in respect of the custody and disposition of the public funds in their hands, to the same extent are they applicable, by virtue of the 3d section of the resolution of March 29, 1867, to the Commissioner of the Freedmen's Bureau and such of his subordinates as held or disbursed public funds under that resolution, in respect of the custody and disposition of such funds. Accordingly, it is my opinion that your first question should be answered in the negative, and I so answer it.

Though the investment of the public funds in question by General Howard and General Balloch was clearly prohibited by the statutory provisions just referred to, yet, undoubtedly, the profits derived from such investment in the shape of interest and premium inured solely to the United States. The money received by those officers in this way was, therefore, public money, and, I think, should have been paid by them directly into the Treasury under the provisions of the act of March 3, 1849, relating to receipts from miscellaneous sources, "without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claim of any description whatever." Agreeably to this view, I also answer in the negative all of your second question except the last clause. That clause requests an opinion as to what legal effect the approval of the Second Comptroller has upon the application of such money to the purposes stated in that question. Touching this subject I will add, that if the approval of the Comptroller was given while officially passing on the accounts of the aforesaid officers, then since the subject-matter (*viz*, as to whether the money actually accounted for by them in the manner ad-

Contracts with the Government..

verted to above was thus *properly and lawfully* accounted for) was in that case manifestly within his jurisdiction, so to speak, his decision thereon must, in my opinion, be regarded as conclusive against the Government, at least until those accounts are re-opened or the settlement thereof set aside on some valid ground, such as fraud, mistake, &c.; but if his approval was not so given, I am unable to perceive that it has any legal effect upon the matter whatever.

The third and last question submitted by you calls for the consideration of the liability, civil and criminal, of the above-named officers, growing out of the transactions hereinbefore mentioned. I have already intimated that, in my view, these officers, by investing the public funds intrusted to them in the manner stated, rendered themselves liable to severe penalties and to be criminally prosecuted therefor, under the provisions of the acts of August 6, 1846, and June 14, 1866. But I think that any criminal prosecution against them, or either of them, on account of such disposition of those funds, would now be barred by the limitations imposed by statute. They still remain civilly liable, however, for so much of the public money received by them as has not been lawfully accounted for, whether it consists of funds drawn on the aforesaid checks and certificates, or interest and premium derived from the investment of those funds, and suits may now be commenced against them to recover the same. Whatever money may be thus recovered should be turned into the Treasury in the same manner as is money recovered from delinquent officers in other cases.

I have the honor to be, very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. B. H. BEISTOW,
Secretary of the Treasury.

CONTRACTS WITH THE GOVERNMENT.

Sections 1781 and 1782 of the Revised Statutes make it illegal for an officer of the United States to have that sort of connection with a Government contract which an agent, attorney, or solicitor assumes when he procures, or aids in procuring, such contract for another, or when he prosecutes for another any claim against the Government founded thereon.

Contracts with the Government.

But there is in the statutes no general provision whereby officers of the executive branch of the Government are forbidden to contract directly with the Government as principals, in matters separate from their offices and in no way connected with the performance of their official duties; nor are those officers forbidden to be connected with such contracts, after they are procured, by acquiring an interest therein.

There is no prohibition against pension-agents contracting directly with the Government, or becoming connected with Government contracts, in the manner just adverted to.

DEPARTMENT OF JUSTICE,

October 29, 1874.

SIR: I have the honor to acknowledge the receipt of the letter, dated October 23, 1874, addressed to me by Hon. B. R. Cowen, Acting Secretary of the Interior, inclosing a letter of October 19, 1874, addressed by Andrew Washburn, United States pension-agent at Richmond, Va., to the Commissioner of Pensions.

My opinion is desired upon the question presented in the letter of Mr. Washburn. That question is: "Whether a United States pension-agent is prohibited by any provision of the act to be found on page 568, vol. 12 of the Statutes, from being connected with a Government contract; and is there any other statute which forbids such connection or makes it illegal?"

The law referred to is the act of July 14, 1862, entitled "An act to grant pensions." (12 Stat., 566-569.) Upon a very careful examination of this law I find in it no allusion to Government contracts. It grants pensions to several classes of persons; but there is no mention of anything like what is meant by a "Government contract." Of course there is no prohibition in it whereby the connection of a pension-agent with such contract is made illegal.

There are, however, several statutes which make it unlawful for officers of the Government to have a certain kind of connection with contracts between the Government and other persons. The 2d section of the act of February 26, 1853, (10 Stat., 170,) prohibits the acting as attorneys or agents by officers of the United States, in the prosecution of claims against the Government; forbids their aiding and assisting (otherwise than in the discharge of their official duties) in the prosecution of such claims; and also receiving any gratuity,

Contracts with the Government.

or any share of or interest in such claims, for services in prosecuting them. In so far as the claims prosecuted are founded upon *contract* with the Government, this statute forbids officers, as agents and attorneys, from having connection with Government contracts. The same may be said of the act of June 11, 1864, (13 Stat., 123.) It prohibits the receiving by officers of the Government compensation for services rendered to any person in relation to "any proceeding, *contract*, claim, &c., when the United States is a party." So, also, the act of July 16, 1862, (12 Stat., 577,) and the act of February 25, 1863, (12 Stat., 696,) make it unlawful for any officer or *agent* of the Government to receive any valuable consideration for procuring, or aiding to procure, for another person, any contract, office, &c., from the United States. The substance of these acts is contained in sections 1781 and 1782 of the Revised Statutes. They make it illegal for an officer of the United States to have that sort of connection with a Government contract which an agent, attorney, or solicitor assumes when he procures or aids to procure such contract for another, and when he prosecutes for another against the Government any claim founded upon a Government contract. These laws forbid also the receiving by officers, for such services, any compensation including that of an interest in the contract.

But there is not in the statutes any *general* prohibition which prevents executive officers from contracting directly with the Government, as principals, in matters entirely separate from their offices and in no way connected with the performance of their duties as officers of the Government; nor are they forbidden to be connected with such contracts, after they are procured, by acquiring an interest in them. And here there is a marked difference made in the legislation of Congress between the members of that body and the executive officers of the Government. Both classes come under the prohibition of the laws above cited. But in the act of 1808, (2 Stat., 484; Rev. Stat., sec. 3739,) which strictly prohibits all interest in, and all connection, as principals, with, Government contracts, members of Congress and Delegates only are mentioned as coming within the intension.

From this statement it is clear that it has not been the purpose of Congress to prohibit executive officers in general

Freedmen's Bureau—Case of F. A. Seely.

from being, as principals, connected with Government contracts, nor, except as above pointed out, from acquiring interests in them. There is not in the statutes any such prohibition applying to United States pension-agents.

I am, sir, very respectfully, your obedient servant,
GEO. H. WILLIAMS.

Hon. C. DELANO,
Secretary of the Interior.

FREEDMEN'S BUREAU—CASE OF F. A. SEELY.

Where public funds were put into the hands of a disbursing-agent of the Freedmen's Bureau for the purpose of paying certain claimants against the Government, of the class designated in the resolution of March 29, 1867, [No. 25,] and the agent, by direction of any such claimant, remitted to the latter the amount of his claim by express or draft: *Held* 1st, that though this mode of payment is not in conformity with the directions of the statute, yet, if the claimant actually received the money, his claim is discharged; 2d, that in case the amount were sent by express, this, being done at the claimant's request, would also constitute a discharge of the claim; 3d, that in case the amount was sent by draft, the claim still subsists unless the draft has been paid; and the fact that it is yet outstanding is (in view of the provisions of said resolution) immaterial.

In the cases mentioned, neither the said agent nor any other officer of the Bureau would seem to incur any special pecuniary liability to the Government in consequence of the action of the agent.

But where the disbursing-agent has remitted funds due claimants to the attorneys of the latter under instructions from such attorneys, given without the knowledge or consent of the claimants, in this case, should the attorneys have failed to pay over the money, the Government would be still liable to the claimants for the amounts due them; and the disbursing-agent would be liable to the Government for the loss it may thus sustain.

The responsibility of the Commissioner of the Freedmen's Bureau would also extend to such loss under the provisions of the aforesaid resolution.

DEPARTMENT OF JUSTICE,
October 29, 1874.

SIR: I have considered the questions presented in a communication addressed to me by Hon. Charles F. Conant, as Acting Secretary of the Treasury, under date of the 14th instant, respecting the case of F. A. Seely, formerly a disbursing-agent of the Freedmen's Bureau.

Freedmen's Bureau—Case of F. A. Seely.

It appears by that communication and the papers received therewith that, in July, 1865, Mr. Seely, who was then in the military service of the United States as an assistant quartermaster of volunteers, was by direction of the Secretary of War assigned to duty in the Freedmen's Bureau, and ordered to report to General Howard, the Commissioner of that Bureau. In March, 1867, the Commissioner appointed him chief disbursing-officer of the Bureau for the State of Missouri, and he was ordered to station himself at Saint Louis. After receiving this appointment, Mr. Seely gave bond, with sureties, in the usual form, conditioned to carefully discharge the duties of his office, and faithfully expend, and honestly account for, all public money that might come into his hands, &c. In March, 1871, the said appointment was revoked, to take effect on the 31st of that month, but by direction of the Secretary of War he was re-appointed an agent of the Bureau, to take effect April 1, 1871. The latter appointment was revoked in March, 1872, to take effect the 15th of the following month, and on the last-mentioned date his connection with the Bureau as an officer thereof terminated.

While Mr. Seely was serving as a disbursing-agent of the Bureau, public funds were put into his hands for the purpose of paying certain claimants of the class mentioned in the resolution of March 29, 1867, (15 Stat., 26.) These funds had been drawn from the Pay Department by the Commissioner of the Bureau, upon certificates issued at the Treasury in the settlement of claims prosecuted by attorneys on behalf of the said claimants, which were made payable to him under the requirements of that resolution; and lists of the parties in whose favor the settlements were made, giving a description of them and stating the amount due each, had been prepared by the Commissioner and sent to Mr. Seely along with the money. It was the duty of the latter to identify those parties and pay them in current funds; not in checks or drafts, but in cash.

Upon receiving the lists and funds aforesaid, it seems that generally Mr. Seely wrote letters to the claimants, transmitting therewith blank receipts for the amounts due them, to be filled up and returned with directions as to how they would receive the money. In some instances these letters

Freedmen's Bureau—Case of F. A. Seely.

were sent to the care of local attorneys who had been originally employed to prosecute the claims before the Department, and by them, it is alleged, receipts were filled out and money obtained thereon fraudulently, which they withheld from the claimants. But he also adopted other methods to reach the proper parties, as by deputizing a clerk to visit the places where they lived and pay them in person; though payments, even in this way, were sometimes made to the wrong parties.

In making payments, the practice was for the agent to take vouchers therefor, which were made out (not in his own name, but) in the name of the Commissioner, General Howard, or of the chief disbursing-officer of the Bureau, General Balloch. These vouchers were then forwarded by the agent directly to the Bureau office in Washington, and were afterward included in the accounts rendered to the Treasury Department by General Howard or General Balloch, as the case might be. So that the agent who actually made the payment did not appear, by the voucher taken or by the account rendered, to be in any way connected with the disbursement of the money.

The foregoing statement comprises the material facts to which the questions submitted by the Acting Secretary relate, as far as I am able to collect them from the papers before me. Those questions read as follows:

1. "Was the action of Mr. Seely in sending moneys to claimants by express or draft, if in accordance with their directions, sufficient to relieve himself, the other officers of the Bureau, the Government, or any of them from further liability in the matter?"

2. "Also, was his action in transmitting moneys to agents originally intrusted with the prosecution of the claims from which the money accrued, under instructions from them, given without the claimant's knowledge or consent, sufficient to relieve himself, the other officers of the Bureau, the Government, or any of them from further liability in the matter?"

3. "In case it is found that the payments thus made are not sufficient, is Mr. Seely or any other officer of the said Bureau liable under his bond for any amount still due the proper claimants in such cases; and, if so, in what manner

Freedmen's Bureau—Case of F. A. Seely.

and form should an action against such officer be brought, especially if against Mr. Seely, who has no account in this Department?"

In my communication to you of the 24th instant, relative to the case of General Howard and General Balloch, (see *ante*, p. 473,) I expressed my views concerning the degree of responsibility and accountability to which officers of the Freedmen's Bureau were subject who held or disbursed public funds under the provisions of the resolution of Congress hereinbefore mentioned; and as those views seem to me to be in the main applicable to the same subject-matter when regarded in connection with the present case, permit me to refer you to them for an indication of my opinion upon this point.

The first question involves the inquiry, whether the sending of the requisite amount of funds to a claimant by express or draft, where it is done by the disbursing-officer *in accordance with the claimant's directions*, is a sufficient satisfaction of the claim of the latter. There is certainly no room for any doubt here, on the supposition that the claimant has actually received the money; it being very obvious that in such case the claim is extinguished, though the mode of making the payment may not have been entirely in conformity with the statute. But supposing the claimant has not received the money: in this case, if the funds had been sent to him by express, pursuant to his request, that would, in my opinion, constitute a discharge of the claim; for the legal effect of the delivery of the funds to the express, under such circumstances, would be no different, I apprehend, as between him and the Government, than it would be as between him and an individual with whom he might have similar dealings. If, however, the amount had been sent to him by means of a draft, at his request, the claim nevertheless subsists still unless the draft has been already paid. The fact that it may be yet outstanding is immaterial, since, as the statute expressly prohibits the disbursing-agent from issuing drafts or checks in payment of the claims, no third party can have acquired a valid demand against the Government by the transfer to him of such outstanding draft.

In answer, then, to the first question, I may observe that I do not perceive how Mr. Seely, or any other officer of the

Freedmen's Bureau—Case of F. A. Seely.

Bureau, can be under any special pecuniary liability in consequence of his action as stated in that question; for it does not appear that the Government has sustained, or is likely to sustain, any loss thereby, though the latter may be still liable to pay those claimants to whom drafts were sent, and which remain unpaid.

The second question presents the case of the transmission of funds due claimants to agents who were originally employed by the former to prosecute their claims, under instructions received from such agents, but which were given without the knowledge or consent of the claimants; and it is asked whether the action of Mr. Seely in so transmitting funds was "sufficient to relieve himself, the other officers of the Bureau, the Government, or any of them, from further liability in the matter." The resolution of March 29, 1867, not only in express terms withheld from the Commissioner of the Freedmen's Bureau, and all officers and agents acting under him, the authority to recognize any power of attorney, &c., in paying these claims, but it forbade the payment of the money due the claimant to any person except the claimant himself, or, if deceased, to his legal representatives. It is plain, then, that by transmitting funds to agents Mr. Seely would have exceeded his authority, even if he had been instructed to do so by agents acting under letters of attorney which empowered them to receive the money. But the case here presented is much stronger, as it would seem that the instructions received by him came from agents who, in giving them, acted without the "knowledge or consent" of the claimants. In this case it is very clear that the Government would still be liable to the claimants for the amounts due them if those agents failed to pay over the money received by them to the latter, and it is equally manifest that Mr. Seely would be liable to the Government for any loss sustained by it which resulted from his unauthorized acts. The responsibility of the Commissioner of the Bureau would also extend to such loss under the provisions of the said resolution.

As to the third question, what I have just said is applicable to the greater portion thereof. The sureties on Mr. Seely's bond would be liable for any breach of its condition that occurred while he held office under the appointment referred

Arms Issued for the Militia of the United States.

to therein. In regard to the "manner and form" of bringing an action against him, in view of the fact that he has no account in the Treasury Department, I suggest that that matter may very safely be left to the judgment of the district attorney, who, when put in possession of the evidence, such as it is, of liability on the part of the officer, will be enabled to determine what course it is best to pursue.

I am, sir, very respectfully, your obedient servant,
GEO. H. WILLIAMS.

Hon. B. H. BRISTOW,
Secretary of the Treasury.

ARMS ISSUED FOR THE MILITIA OF THE UNITED STATES.

The laws of Congress upon the subject of arming the militia reviewed and considered with reference to the question, "Whether, under existing laws, the right of property in the arms issued for arming the militia of the United States is vested in the State authorities, with power to dispose of them by sale or otherwise without accounting to the United States;" and held that the States do not, by the existing laws, have an absolute right of property in such arms, and that they derive no authority therefrom to sell or dispose of them at pleasure.

The arms transmitted to the States under those laws (which are embodied in sections 1661, 1667, and 1670 of the Revised Statutes) are, in contemplation of the provisions thereof, to be held by the States for a specific purpose only, which is pointed out therein; hence, they become invested with nothing more than a qualified property in such arms; and they cannot, as a matter of right, and without interfering with the regulations of Congress on a subject over which its authority is paramount, make any disposition or use of such arms which defeats the purpose referred to.

Yet those laws make no provision for any accountability to the United States, respecting the disposition of the arms, after they are once delivered to the State authorities; Congress having seen fit to leave it entirely to the good faith of the States, when the delivery takes place, to carry out the purpose contemplated in furnishing the arms.

The governor of Virginia having made a requisition upon the Chief of Ordnance for a certain number of revolvers, to be drawn as part of the quota of that State, the latter officer gave to an agent of the State an order for the revolvers upon the manufacturer, which the agent, acting under the directions of the governor, assigned to certain parties in New York in part payment for camp-equipage furnished the State, with the understanding that the delivery of the revolvers by the manufacturer should be made directly to them. But the Chief of Ordnance, on being

Arms Issued for the Militia of the United States.

informed of this transaction, directed the delivery by the manufacturer to said parties, on the order, to be withheld. *Advised* that it was very proper for the Chief of Ordnance to withhold the delivery of the arms to the assignees of the order, as he could not, under the laws mentioned, recognize any right *in them* to the arms; but that the arms cannot be indefinitely withheld from the State, the statute requiring the distribution to be made annually.

DEPARTMENT OF JUSTICE,
November 11, 1874.

SIR: I have considered the question referred to me from your Department on the 15th of September, last, namely: "Whether, under existing laws, the right of property in the arms issued for arming the militia of the United States is vested in the State authorities, with power to dispose of them by sale or otherwise without accounting to the United States."

This question, it would seem from the papers submitted, has been suggested by facts of recent occurrence which are especially connected with the quota of arms due, under the statute relating to the arming of the militia, to the State of Virginia. It appears that the governor of that State made requisitions upon the Chief of Ordnance for about 2,307 revolvers, to be drawn as a portion of the said quota. To meet these requisitions the latter officer, in July last, gave to an agent of the State orders upon the manufacturer for that number of revolvers, to be delivered within a short period thereafter. Upon receiving these orders, the agent, acting under the directions of the governor, proceeded to New York, and, in behalf of the State, entered into contracts with certain parties for camp-equipage. It was agreed that the contractors should receive in payment for the camp-equipage furnished the State, under their contracts, an assignment of the aforesaid orders, and that the delivery of the arms by the manufacturer should accordingly be made directly to them. But I understand that the Chief of Ordnance, having information of this transaction, and conceiving that the right of the State to make such disposition of the arms intended for the militia thereof was not entirely free from doubt, directed the delivery of revolvers on said orders to be withheld until that point is determined; and the determination of that point has been thought to depend on the solution of the question referred to me.

Arms Issued for the Militia of the United States.

The laws in force which provide for the furnishing of arms to the militia by the General Government are contained in the following sections of the Revised Statutes:

"SEC. 1661. The annual sum of two hundred thousand dollars is appropriated, to be paid out of any money in the Treasury not otherwise appropriated, for the purpose of providing arms and equipments for the whole body of the militia, either by purchase or manufacture, by and on account of the United States.

"SEC. 1667. All the arms procured in virtue of any appropriation authorized by law for the purpose of providing arms and equipments for the whole body of the militia of the United States shall be annually distributed to the several States of the Union, according to the number of their Representatives and Senators in Congress, respectively; and all arms for the Territories and for the District of Columbia shall be annually distributed in such quantities, and under such regulations, as the President may prescribe. All such arms are to be transmitted to the several States and Territories by the United States.

"SEC. 1670. The Secretary of War is authorized and directed to distribute to such States as did not receive the same, their proper quota of arms and military equipments for each year, from eighteen hundred and sixty-two to eighteen hundred and sixty-nine, under the provisions of section sixteen hundred and sixty-one: *Provided*, That in the organization and equipment of military companies and organizations with such arms, no discrimination shall be made between companies and organizations, on account of race, color, or former condition of servitude."

The provisions of the above-named sections have been taken from the act of April 23, 1808, chap. 55, the act of March 3, 1855, chap. 169, and the act of March 3, 1873, chap. 282.

By the first of those sections (sec. 1661) an annual appropriation is made "for the purpose of providing arms and equipments for the whole body of the militia." The next section (sec. 1667) provides for an annual distribution, among the several States and Territories, of the arms procured by means of such appropriation. It requires these arms to be

Arms Issued for the Militia of the United States.

transmitted by the United States to the several States and Territories, the quota for each State to be according to the number of its Representatives and Senators, and the quota for each Territory, including the District of Columbia, to be according as the President may prescribe. The remaining section (sec. 1670) is only applicable to the particular case where a State did not receive its proper quota of arms and military equipments for any period from 1862 to 1869. It authorizes the Secretary of War, in that case, to distribute to such State its quota for that period, subject to the proviso therein contained.

In none of the sections adverted to is there any provision which expressly vests the property in the arms, after their distribution, in the States absolutely; nor do I find anything therein from which such a change of ownership results by necessary implication. To get at the intent and meaning of the existing laws with reference to that point, it seems, therefore, proper to recur to the earlier legislation on the subject of arming the militia, and particularly to that part of it from which the provisions in the Revised Statutes have been taken.

The power of Congress to legislate on that subject is expressly conferred by the Constitution, (see Article I, sec. 8, par. 16;) and the first instance of the exercise of this power by that body is found in the act of May 8, 1792, entitled "An act more effectually to provide for the national defense, by establishing an uniform militia throughout the United States." (1 Stat., 271.) There it consisted simply in requiring each enrolled militia-man to "provide himself" with arms of a certain description. (See 1st section of that act.) This requirement is, however, reproduced in the Revised Statutes, (see section 1628,) and it constitutes now, as it did originally, what may be regarded the general law upon the subject of arming the militia—the other provisions of the Revised Statutes upon the same subject, to which reference has been made, being auxiliary, and not substitutive, in their character.

Next followed the act of July 6, 1798, entitled "An act providing arms for the militia throughout the United States." (1 Stat., 576.) By this act, thirty thousand stand of arms were authorized to be provided, at the expense of the Gov.

Arms Issued for the Militia of the United States.

ernment of the United States, and "sold to the governments of the respective States, or the militia thereof," under such regulations and at such prices as the President might prescribe. But its object was only to meet an immediate want then felt by some of the States, (especially the Southern,) the people whereof were generally destitute of arms, and could not easily supply themselves therewith. It sought to facilitate the procurement of arms by the latter, to a limited extent, by enabling them or their respective States to purchase the same from the United States. The act of April 2, 1808, authorizing the sale of public arms to the States, (2 Stat., 481,) though it does not purport to have been passed with a view to arming the militia, is of a piece with the act of 1798, and contemplated similar objects.

The act of April 23, 1808, entitled "An act making provision for arming and equipping the whole body of the militia of the United States," (2 Stat., 490,) is the first statute that contains provisions, of a general and permanent nature, for furnishing arms and equipments to the militia by the United States; and it deserves to be well considered here, for the reason that some of the more important of its provisions, directed to that end, are embodied in one or two of the sections of the Revised Statutes above quoted. The 1st section of the act is in substance the same as section 1661 of the Revised Statutes. It appropriates the sum of two hundred thousand dollars, annually, "for the purpose of providing arms and military equipments for the whole body of the militia of the United States, either by purchase or manufacture, by and on account of the United States." The 3d section declares that the arms procured in virtue of the act "shall be transmitted to the several States composing this Union, and Territories thereof, to each State and Territory, respectively, in proportion to the number of the effective militia in each State and Territory, and by each State and Territory to be distributed to the militia in such State and Territory, under such rules and regulations as shall be by law prescribed by the legislature of each State and Territory." The rest of the act is not material in this connection.

The object of the annual appropriation made by this act is plainly expressed therein; it was, to provide arms and

Arms Issued for the Militia of the United States.

equipments for the entire militia of the United States, so far as such appropriation would enable this to be done. That object was contemplated to be carried out partly through the agency of officers of the General Government, and partly through the intervention of the State and Territorial authorities. Thus the procuring of the arms, with the means provided therefor, was in the first place to be done by officers of the United States, who were then to transmit the same to each State and Territory in proportion to the number of the effective militia thereof; whereupon the State and Territorial authorities were to distribute the arms so transmitted to them among the militia in their respective States and Territories, under such rules and regulations as should be prescribed by the local laws.

Accordingly, the States and Territories with which arms were deposited under this act must be deemed to have held them for a specific purpose only, and consequently (regarding the subject from a strictly legal point of view) to have had no right to divert them from that purpose by alienation or otherwise. They stood, as it were, in the situation of trustees, charged with the distribution of the arms, and had no other property therein than such as was necessary to enable them to perform that trust.

That the States and Territories, in contemplation of this statute, were to be vested with a qualified, not an absolute, ownership of the arms transmitted to them, is very manifest from its terms, which exclude the idea that a power to dispose of the arms in any manner and for any purpose, such as would be incident to absolute ownership alone, was intended, by which the very object of the law, viz, the arming of the militia, might be frustrated altogether. A similar view was taken by the Senate in 1855, by which it was then thought necessary, in order to enable the States and Territories to sell the arms theretofore distributed under the act of 1808, to make provision therefor by statute, as impliedly appears from the action of that body in passing, by way of amendment to the Army appropriation bill then pending before it, a section which provided: "That the governors of the several States and Territories be, and they are hereby, authorized to sell, to the best advantage, the arms heretofore distributed under

Arms Issued for the Militia of the United States.

the act of April 23, 1808, and invest the funds arising out of such sales in other arms more suitable for the purposes contemplated by said act: *Provided*, That no arms be so purchased or provided except such as may be of the same description and caliber as those regularly adopted and in use in the Army of the United States." This amendment was not concurred in by the House, on the recommendation of the Committee of Ways and Means, and so it did not become a law. Yet, while the negative action of the House cannot with certainty be attributed to a difference of view as to the power of the States and Territories over such arms under the then existing laws, (for it may have proceeded from a doubt as to the expediency of the proposed measure,) the affirmative action of the Senate can assuredly be taken as an indication of its sense with respect to such power, and that was clearly this, that the power, whatever it might be, did not include the right to alienate the arms without the consent of Congress.

But to look at the subject from another stand-point: I have already adverted to the fact that the power of Congress to provide for the arming of the militia is expressly conferred by the Constitution. It is not maintained that this power is exclusively vested in Congress. It is merely an affirmative power, and if not in its own nature incompatible with the existence of a like power in the States, it may well leave a concurrent power in the latter; so that if Congress did not choose to make any provision for arming the militia, it would be competent to the States to do it in such manner as they might think proper. But when once Congress has carried this power into effect, its laws for the arming of the militia are the supreme law of the land; and all interfering State regulations must necessarily be suspended in their operation. (*Houston vs. Moore*, 5 Wheat., 51.) Now, it appears that in the exercise of this power, and with a view to provide for the national defense, Congress had undertaken to furnish arms for the militia at the expense of the General Government. The kind and pattern of arms to be thus furnished were left to the determination of the officers of the General Government; and hence such arms as were procured and transmitted by these officers to the States and Territories for the militia

Arms Issued for the Militia of the United States.

thereof must be regarded as arms specifically provided therefor by the paramount law. This being the case, is it not obvious that the State and Territorial authorities could not rightfully exchange those arms for others of a different kind or pattern, and distribute the latter to the militia in place of the former? or sell the arms so provided, and invest the proceeds of the sale in other property which such authorities might conceive to be more needful to promote the efficiency of the militia? In either of these cases the action of the State and Territorial authorities would manifestly be in direct collision with the supreme law of the land.

Still, it is to be observed that the statute under consideration made no provision for any accountability to the United States in regard to the disposition of the arms after their delivery to the State and Territorial authorities. When that took place, the control of the officers of the General Government over the arms ceased; and whether the future destination or use of the property was consistent with the design of the statute, depended wholly upon the good faith of the States and Territories themselves. Practically, then, they might do what they pleased with it, though the disposition made of it by them should defeat the ends of the statute; for no way existed, as I conceive, to compel the execution of the trust devolved upon them.

By the 7th section of the act of March 3, 1855, (10 Stat., 639,) the annual distribution of arms to the States, which, under the act of 1808, was made in proportion to the number of the effective militia thereof, was required to be made according to the number of their Representatives and Senators in Congress, respectively; and, in regard to the Territories and the District of Columbia, the arms were, by the same section, required to be distributed in such quantities and under such regulations as the President, in his discretion, might prescribe. These provisions are substantially embodied in section 1667 of the Revised Statutes. They modify the previous law no further than to introduce a new basis for making distribution of the arms to the States and Territories, which thenceforth took the place of the one originally prescribed.

Thus the law remained, touching the transmission of arms

Arms Issued for the Militia of the United States.

to the several States and Territories for the militia, up to the time of the adoption of the Revised Statutes; and I discover nothing in the provisions of the latter indicative of an intention on the part of Congress to clothe the States with any right of property in the arms thereafter to be transmitted to them, other or different from that which they had in the arms theretofore deposited with them.

The purpose of the annual appropriation thereby provided is the same, precisely, as was that of the similar appropriation provided by the statute formerly in force, viz, to furnish arms for the militia. The basis upon which the arms are to be distributed to the States is likewise the same as that previously established, (*i. e.*, by the act of 1855 cited above,) and they are required to be transmitted to the several States by the United States. It is true that in the Revised Statutes there is no clause expressly directing the arms to be distributed by each State to the militia thereof, as there was in the former statute; but the omission to insert any such clause therein is not to be understood as signifying an intent to relieve the States from that charge. The inference necessarily follows, from the declared purpose for which the appropriation for procuring the arms is made, that they are to be transmitted to the States for distribution among the militia, and for that object solely; and an express direction to that effect not being therefore really needed, it is probable that for this reason none was inserted.

Viewing the provisions of the Revised Statutes, above quoted, in connection with the previous legislation, I am unavoidably brought to the conclusion that, in contemplation of those provisions, the arms transmitted to the States thereunder are to be held by them for a specific purpose only, which is pointed out therein; that they therefore become, strictly speaking, invested with nothing more than a qualified property in such arms; and that they cannot, as a matter of right, and without thereby interfering with the regulations of Congress on a subject over which its authority is necessarily paramount, make any disposition or use of such arms which defeats the purpose referred to, though if this should be done there would seem to be no remedy without further legislation by Congress.

Appointment in the Army.

In answer, then, to the question propounded, I have the honor to state that, in my opinion, the States do not, by the existing laws, have "the right of property in the arms issued for arming the militia," if an absolute right of property is there meant; and that they derive no authority, under those laws, to sell or dispose of such arms at their pleasure.

As I have already observed, the statute makes no provision for any accountability whatever to the General Government respecting the disposition of the arms when they have once been delivered to the States; Congress having seen fit to leave it entirely to the good faith of the latter, after the delivery takes place, to carry out the purpose contemplated in furnishing the arms.

In regard to the actual case here presented, which concerns a part of the quota of arms due the State of Virginia, I may add that the disposition of the revolvers hereinbefore mentioned, recently sought to be made by the authorities of that State, would clearly have been unwarranted by the existing laws of Congress on the subject of arming the militia. It was accordingly very proper for the Chief of Ordnance to withhold the delivery of the revolvers to the parties to whom the orders issued therefor had been assigned. He could not, under those laws, recognize any right in such parties to the revolvers. But the arms cannot be indefinitely withheld from the State; the statute requiring them not only to be annually distributed, but to be transmitted to it by the General Government. After this is accomplished, the officers of the latter have nothing further to do with the arms so transmitted.

I am, sir, very respectfully, your obedient servant,
GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,
Secretary of War.

APPOINTMENT IN THE ARMY.

Where an officer in a regiment has resigned, or is lawfully dismissed from the service, and his connection with the Army has thus ended, he cannot afterward be legally restored by re-appointment to his former grade and position, if he would thereby be made to outrank other officers then already holding commissions in the regiment, unless such re-appointment is specially authorized by Congress.

Appointment in the Army.

The re-appointment in the above case is precluded by the Army Regulations, which have the force and effect of law, and which require, as a general rule, all vacancies in the regimental offices to be filled by promotion according to seniority.

DEPARTMENT OF JUSTICE,*November 20, 1874.*

SIR: Your communication to me dated the 10th ultimo propounds this question: "Can a person whose connection with the Army as a commissioned officer has been severed by resignation or legal dismissal be legally restored to his former rank or commission by re-appointment to fill a vacancy in a regiment or corps of the Army, where, by such re-appointment, he will become superior in rank and position to another officer who holds a commission in the same regiment or corps prior to such re-appointment?"

If I correctly understand the above question, its import and practical bearing may be illustrated by the following hypothetical case: The senior captain in a regiment resigns or is lawfully dismissed from the service, and thus ceases to be an officer of the Army; afterward, (there being a vacant captaincy in the regiment,) it is proposed to restore him by re-appointment to his former grade and position, whereby he would outrank other officers then already holding commissions in the same regiment; can such re-appointment be legally made? Here the question involves the rights of such of those other officers as belong to the grade to which it is proposed to make the appointment, as well as the rights of such of them as belong to the next inferior grades. But, regarded in either aspect, its solution would seem to depend upon the same point, viz, whether the appointment is or is not precluded by certain regulations of the Army, hereinafter referred to, which prescribe a mode for filling vacancies therein.

In an opinion which I had the honor to communicate to you on the 9th of January, 1873, in the case of Major Absalom Baird, (see *ante*, p. 164) the question as to the power of Congress to regulate promotions and appointments in the Army was considered at some length; and after a review of the action theretofore had on the subject of such promotions and appointments, both by the Executive and by the legislature, the conclusion arrived at was stated in the following

Appointment in the Army.

terms: "It may therefore be regarded as definitely settled by the practice of the Government, that the regulation and government of the Army include, as being properly within their scope, the regulation of the appointment and promotion of officers therein. And as the Constitution expressly confers upon Congress authority 'to make rules for the government and regulation of' the Army, it follows that that body may, by virtue of this authority, impose such restrictions and limitations upon the appointing power as it deems proper in regard to making promotions or appointments to fill any and all vacancies, of whatever kind, occurring in the Army, provided, of course, that the restrictions and limitations be not inconsistent or incompatible with the exercise of the appointing power by the department of the Government to which that power constitutionally belongs."

I beg to refer you to the same opinion, and also to a previous one sent to you on the 22d of January, 1872, (the latter relating to certain vacancies in the Quartermaster's Department, see *ante*, p. 2,) for an expression of my views with respect to the present regulations as to the filling of vacancies in the Army, which are comprised in paragraphs 19, 20, and 21 of the Army Regulations of 1863. There the result reached is, that those regulations (being, as they are shown to be, sanctioned by Congress) have the force and effect of law, and must be taken to control the appointing power in regard to that subject until Congress otherwise provides.

The regulations just referred to require, as a general rule, all vacancies occurring in the Army to be filled by promotion according to seniority; and this requirement, agreeably to the above view, is binding as a law. Its existence and efficacy as such are, moreover, distinctly recognized in section 1205 of the Revised Statutes. Thus in that section, after making some provisions touching the transfer of officers from the line to the staff, the statute reads: "When any officer so transferred has, in virtue of seniority, obtained or become entitled to a grade in his regiment equal to the grade in his commission in the staff, he shall vacate either his commission in the line or his commission in the staff." Here, one of the contingencies provided for is that of an officer becoming *entitled* to a superior grade in his regiment *in virtue of seniority*. This

Appointment in the Army.

provision clearly recognizes the existence of a law under which an officer who holds the senior commission in an inferior grade thereby acquires a right to be appointed to a superior grade on the happening of a vacancy therein, and in adopting it Congress obviously had in mind the then subsisting regulations for filling vacancies in the military service by promotion, in which seniority is the governing principle. (See, also, in this connection the preamble to the act of June 16, 1874, chap. 290; also, the act of June 8, 1872, chap. 351.)

In the hypothetical case under consideration, the circumstance that the person whom it is proposed to appoint formerly held the same rank or position in the regiment as that to which the appointment would be made, is not material. His previous connection with the service having ceased, he thereupon became a civilian, and in a legal point of view he can be regarded as standing on no different ground, relatively to an appointment to such rank or position, than that occupied by any civilian who may never have been in the Army. If it would be contrary to the law of the military service to appoint the one thereto, so would it be to appoint the other.

Looking at the subject in this light, it is very plain that the proposed appointment here could not be made consistent with the requirements of that law—by which I mean the regulations of the Army—in regard to filling vacancies. So that the point hereinbefore suggested, whether such appointment is or is not precluded by those regulations, should, in my opinion, be resolved in the affirmative.

Therefore, assuming that the case set forth in general terms in the question propounded by you corresponds in character with the hypothetical one stated by me, the answer I make to that question is, that a person, such as is described therein, cannot be legally restored to his former rank and position in the regiment or corps by re-appointment. To enable this to be done, it will be necessary to obtain authority from Congress.

I am, sir, very respectfully, your obedient servant,
GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,
Secretary of War.

International Exhibition.

INTERNATIONAL EXHIBITION.

The property of exhibitors at the International Exhibition, at Philadelphia, in 1876, will not be liable to seizure for any debts, claims, or demands whatsoever against the Centennial Commission, or against any other corporate body, person, or association of persons connected with said exhibition.

DEPARTMENT OF JUSTICE,

November 27, 1874.

SIR: I have the honor to acknowledge the receipt of your letter of November 4, 1874, and the papers transmitted therewith, being copies of the following documents: a letter addressed to the Secretary of State, of date 16th September, 1874, by Baron Schwartz-Senborn, minister of Austria-Hungary; a letter addressed to the Secretary of the Interior, dated November 2, 1874, by Hon. Alfred T. Goshorn, Director-General of the International Exhibition, 1876; and a communication from Hon. John L. Shoemaker, counselor and solicitor for the Centennial Commission, addressed to the Director-General of the Exhibition. These papers all relate to the subject of your letter, and to the question upon which you request of me an expression of opinion. That question is, Whether the goods of foreign exhibitors, sent to the International Exhibition to be inaugurated at Philadelphia, July 4, 1876, "will be free from seizure by the creditors of the Centennial Exhibition Commission and Committee, so that they (the foreign exhibitors) may not lose their property or have difficulty in removing the same."

The laws which have been passed concerning the "International Exhibition" are the acts of Congress, approved March 3, 1871, (16 Stat., 470,) and June 2, 1872, (17 Stat., 202.) Also, the acts of the legislature of the State of Pennsylvania passed June 2, 1871, (Laws of Pennsylvania for 1871, p. 1311,) and March 27, 1873, (Laws of Pennsylvania for 1873, p. 50.) Upon a careful reading of these statutes, I find in them no provision giving to the Centennial Commission, or to any corporation or association of persons connected with the management of the exhibition, any property-interest in the goods of the exhibitors. These persons and bodies corporate

International Exhibition.

will have no ownership in the goods. They will be, at most, depositaries or bailees having the temporary custody of the goods for the purposes of the exhibition. The relations of all parties to the goods, upon their admission to the exhibition, will be governed by the laws of the Commonwealth of Pennsylvania. In that State, as everywhere, it is true generally that the property of one cannot be taken for the debt or liability of another. There must be, in the debtor, ownership, or an estate in the thing, to enable the creditor to execute his process upon it.

The law of Pennsylvania is very careful to protect the rights of persons to their property which is in the hands of others, and holds only that which the debtor *owns* answerable for his debts. The reports of her highest tribunal abound with cases which, under a great variety of circumstances, show the prevalence of this general rule. That court has decided that a sheriff is liable in damages as a trespasser, at the suit of the real owner, for levying an attachment upon goods in the possession of another, and making a return upon the writ that they were "attached," although there was no "manual handling of the goods by the sheriff nor removal of them." Other cases, showing the strictness of the rule, are, *Spangler vs. Admrs. of Martin*, 16 Serg. & R., 68; *Cane vs. Watmough*, 6 Whar., 117; *Banks vs. Jones*, 42 Penn., 536; same case, 44 Penn., 253. Under the law of Pennsylvania, as shown by these cases, it is very clear that the goods of the exhibitors will be free from all liability to seizure upon demands against the commission for which no superior lien can be claimed.

The classes of obligations, for the satisfaction of which liens attach to real estate and sometimes to the personal property found on it, are taxes, rent, and the claims of mechanics, material-men, and laborers upon buildings or structures, to the erection of which they have contributed skill, materials, or labor. By the law of Pennsylvania, the personal property of the tenant or occupier of real estate upon which taxes are assessed is liable to be distrained for those taxes; but the goods of others in the possession of the tenant, and found upon the premises, are exempt. (2 Brightly's Purdon's Digest of the Laws of Pennsylvania, 1370; sec. 90 of the Tax

International Exhibition.

Laws; see *Moore vs. Marsh et al.*, 60 Penn., 46.) As to rent, it is well settled by repeated decisions of the supreme court of that State that the goods of strangers, in the possession of the tenant, are privileged from seizure for rent due upon the premises, where the course of the tenant's business must of necessity give him such possession. For the benefit of trade, and for the public convenience and advantage, the goods of third persons put in the way of business upon rented premises are protected from distress for rent. It would not be less prejudicial to the public than unjust to the owner were his property liable to be seized for the debts of those through whose hands, in the current of the world's business, it must pass. (*Brown vs. Sims*, 17 Serg. & R., 138; *Riddle vs. Welden*, 5 Watts, 9; *Cadwalader vs. Tindall*, 20 Penn., 20; *Briggs vs. Large*, 30 Penn., 287.)

In *Brown vs. Sims* it was said by Chief-Justice Gibson that "the right to distrain the property of a stranger rests on no principle of reason or justice," and that the exceptions would, in the end, eat out the rule. The principle upon which he rests these exceptions, viz, the public convenience and advantage, is present and dominant in the case under discussion. It is for the convenience and advantage, and I will add for the good name and honor, of the whole nation, but particularly of the city of Philadelphia and the Commonwealth of Pennsylvania, that the property of all exhibitors, especially those from abroad, should be free from all liability for the debts of those who are to control and manage the exhibition, whether those debts be for taxes, rent, or any obligation whatsoever.

The claims of mechanics, material-men, and laborers, who contribute skill, materials, and labor in the erection of the buildings, can be made liens upon them, but those liens cannot be extended so as to attach to the goods placed in the buildings. (Secs. 1, 2, 18, of the mechanics' lien act, 2 Brightly's *Purd. Dig.*, p. 1025.)

As regards liability for rent and taxes, I have considered the question as if the ground on which the buildings are to be erected for the Centennial Exhibition, and the buildings also, were subject to taxation, and the commission having the control of the exhibition a tenant owing rent to the owner

Case of General Schuyler Hamilton.

of the premises. This, however, is far from the fact. The ground is public property, owned by the city of Philadelphia, and is not, as I understand, subject to taxation. It is freely tendered by that municipality to the use of those who, by law, will manage and control the exhibition, and they are not considered to be in the situation of tenants owing rent to a landlord.

For the reasons above set forth, I am clear in the opinion that the goods of those who shall appear as exhibitors at the "International Exhibition" will, under the laws of Pennsylvania, be entirely free from liability to seizure for any debts, claims, or demands whatsoever against the Centennial Commission or any other corporate body, person, or association of persons having to do with said exhibition. I cannot conceive of any risk, from this source, of the loss of their goods by foreign exhibitors, nor of any difficulty they will meet with in removing their property.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. C. DELANO,

Secretary of the Interior.

CASE OF GENERAL SCHUYLER HAMILTON.

The claim of General Schnyler Hamilton to be placed on the retired-list of the Army, based on his appointment to the staff of Brevet Lieutenant-General Scott as a military secretary, is inadmissible under the laws in force; he not being now an officer on the active-list by virtue of that appointment.

Under the act of March 3, 1857, chap. 106, Brevet Lieutenant-General Scott was entitled, when exercising command according to that rank, and then only, to the staff to which he had appointed General Hamilton; and upon the retirement of the former from active service, and consequent withdrawal from command, to wit, on the 1st of November, 1861, the appointment of the latter was *ipso jure* revoked.

DEPARTMENT OF JUSTICE,

November 28, 1874.

SIR: I have examined the papers in the matter of the application of General Schuyler Hamilton to be placed on the retired-list of the Army, sent to me under cover of your let-

Case of General Schuyler Hamilton.

ter of the 20th of April last, in which letter you request my opinion as to whether he can legally be placed on that list.

It appears by these papers that on the 9th of May, 1861, while General Hamilton was serving as a private in the Seventh Regiment of New York Volunteers, he received an appointment to the staff of General Scott as a military secretary, with the rank of lieutenant-colonel, which he accepted, and he afterward entered upon duty in that capacity. This appointment was made by General Scott under the provisions of section 16 of the act March 3, 1857, (11 Stat., 205.) Subsequently General Hamilton was by the President appointed an aid-de-camp, with the rank of colonel, under the act of August 5, 1861, (12 Stat., 314;) but this office he vacated under an order of discharge issued by the President in December, 1861. He was next appointed a brigadier-general of volunteers; and next a major-general of volunteers, which position he resigned in February, 1863.

The application of General Hamilton, however, is not based upon either of the last-mentioned appointments, (*i. e.*, of aid-de-camp, brigadier-general, or major-general,) but upon the appointment of military secretary, which he received from General Scott as aforesaid.

This application involves the assumption, on his part, that he is at the present time a commissioned officer on the active-list of the Army, by virtue of that appointment; for he must be aware that unless he is an officer of that description he cannot claim the benefit of the existing provisions of law which authorize the retirement of Army officers. But I think it is very manifest from an examination of the statutes relating to the said appointment of military secretary, taken in connection with the facts of the case as presented, that the assumption adverted to has nothing whatever to rest upon.

In March, 1855, the grade of lieutenant-general, by brevet, was conferred upon General Scott, to take rank from March 29, 1847, pursuant to the authority given by a resolution of Congress approved February 15, 1855, (10 Stat., 723.)

By section 16 of the act of March 3, 1857, (11 Stat., 205,) it was declared that said resolution should be so construed from and after March 29, 1847, in favor of the brevet lieutenant-general appointed thereunder, "while exercising command

Case of General Schuyler Hamilton.

according to that rank," as to entitle him to the pay, allowances, and staff specified in the 5th section of the act of May 28, 1798, (1 Stat., 558.)

The staff specified in the 5th section of the act of May 28, 1798, comprised a number of aids, not exceeding four, and secretaries, not exceeding two, each of whom was to have the rank, pay, and emoluments of a lieutenant-colonel; and these aids and secretaries were authorized to be appointed, from time to time, as he might judge proper, by the lieutenant-general provided for in that section.

The power to appoint aids and secretaries, with which the lieutenant-general was invested by the 5th section of the act of 1798, was conferred upon the brevet lieutenant-general by the 16th section of the act of 1857; and, as I have before intimated, the appointment of General Hamilton, as military secretary, was made under the latter section.

It is to be observed, also, that the act of 1857, in providing for a staff for the brevet lieutenant-general, makes him entitled to the staff specified as aforesaid "while exercising command according to that rank;" and that it would seem to be a necessary implication from the language of this provision, that when *not* exercising command according to that rank he would not be entitled to the staff referred to.

By the 15th section of the act of August 3, 1861, (12 Stat., 239,) any commissioned officer of the Army, who should have served as such for forty consecutive years, might be retired upon his own application, with the pay and emoluments allowed by that act; but by a proviso contained in the 16th section of the same act, in case of the retirement of the brevet lieutenant-general thereunder, it was to be without reduction in his current pay, subsistence, or allowances.

On the 1st of November, 1861, upon his own application, Brevet Lieutenant-General Scott was placed upon the list of retired officers of the Army, and thereby withdrawn from active service and command.

At this point the question naturally arises, whether the appointment of General Hamilton as military secretary was not determined by the withdrawal of Brevet Lieutenant-General Scott from active service and command.

I cannot but think that such was its fate. Under the act

Citizenship—Case of Charles Levy.

of 1857, as has been shown, Brevet Lieutenant-General Scott was entitled, when exercising command according to that rank, and then only, to the staff to which he had appointed General Hamilton. On his retirement from active service and consequent withdrawal from command, that condition of things which was not less essential to the legal continuance of such staff than it was to originally entitle him thereto, ceased to exist; and thereupon, in my judgment, the appointment of General Hamilton *ipso jure* terminated.

Other objections might be urged against the assumption involved in the application under consideration, but it seems to me to be unnecessary to pursue the subject further, the result already arrived at conclusively establishing, to my mind, that, under the laws now in force, General Hamilton cannot legally be placed on the retired-list of the Army.

I have the honor to be, very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,
Secretary of War.

CITIZENSHIP—CASE OF CHARLES LEVY.

By a copy of the registry of births at Hamburg, in Germany, it is shown that Rudolph Carl Levy was born in that place on the 22d of February, 1853; and on the 10th of July, 1873, he was admitted to citizenship in the United States, under the name of Charles Levy, by the court of hustings of the town of Staunton, in the State of Virginia, as shown by the record of that court. Upon the question whether Levy should be recognized by the United States as a citizen thereof: *Advised* that the judgment of said court (it appearing to have jurisdiction in the matter of admitting aliens to citizenship, and there being no appeal from its decisions in such matter) is to be regarded as final and conclusive upon the facts in the case of Levy, and consequently that he should be recognized by the Government as a citizen of the United States.

DEPARTMENT OF JUSTICE,
December 3, 1874.

SIR: I have the honor to acknowledge the receipt of your letter of the 25th of November, 1874, and of the papers transmitted therewith, to wit, a copy of the registry of the birth of Rudolph Carl Levy, certified by the registrar of the Ger-

Citizenship—Case of Charles Levy.

man Israelitish Congregation at Hamburg, and a copy of the record of the proceedings of the court of hustings of the city of Staunton, State of Virginia, upon the admission of Charles Levy to citizenship in the United States of America.

These documents seem to be properly authenticated. The first shows that Rudolph Carl Levy was born on the 22d day of February, 1853, in Hamburg, Germany, and the second proves that by the court of hustings, of the city of Staunton, Virginia, Charles Levy was admitted to citizenship in the United States on the 10th day of July, 1873.

Presuming that Rudolph Carl Levy and Charles Levy are different names for the same person, (though this fact is not made absolutely certain by the evidence,) I proceed to answer the inquiry suggested by the minister of the German Empire, whether Levy will be recognized by the United States Government as an American citizen.

The court of hustings of the city of Staunton is a court of record in the State of Virginia. It is a court of common-law jurisdiction, having a seal and a clerk. (Code of Virginia, 1873, pp. 87, 143, 1036.) It is, therefore, a court having jurisdiction in the matter of admitting aliens to citizenship. (Section 2165, Rev. Stat.) The record shows that this court, having found upon evidence in Levy's case the facts and conditions required by section 2167, Revised Statutes, adjudged that he be admitted to citizenship in the United States of America. This was a judicial act, by a court of competent authority, upon such hearing and finding of facts as the law prescribes. It has the force and effect of a judgment. I find no law by which an appeal can be taken from it, and certainly I know of no authority or provision of law which will warrant the executive power of the Government in evading it or treating it as a nullity. The decision of the hustings court of Staunton is, in my opinion, final and conclusive; and in accordance therewith Charles Levy must be recognized by the United States Government as an American citizen. (6 Cranch, 176; 4 Peters, 408.)

I am, very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. HAMILTON FISH,

Secretary of State.

Testimony of Accomplices.

TESTIMONY OF ACCOMPLICES.

The prohibition contained in section 19 of the act of June 22, 1874, chap. 391, against compromising or abating any claim of the United States for any fine, penalty, or forfeiture incurred by a violation of the customs-laws, does not apply to such arrangements as are ordinarily made by district attorneys for obtaining the testimony of accomplices in *criminal cases*, whereby an assurance is given to the accomplice, who is to be used as a witness, of exemption from prosecution in case he acts in good faith and makes a full disclosure.

DEPARTMENT OF JUSTICE,
December 12, 1874.

SIR : I have the honor to acknowledge the receipt of your letter of the 23d ultimo, transmitting for my consideration a communication from the United States attorney for the southern district of New York, in which he propounds an inquiry touching the proper construction of section 19 of the act of June 22, 1874, entitled "An act to amend the customs-revenue laws and to repeal moietyes."

That section provides, "That it shall not be lawful for any officer or officers of the United States to compromise or abate any claim of the United States arising under the customs laws, for any fine, penalty, or forfeiture incurred by a violation thereof; and any officer or person who shall so compromise or abate any such claim, or attempt to make such compromise or abatement, or in any manner relieve or attempt to relieve from such fine, penalty, or forfeiture, shall be deemed guilty of a felony, and on conviction thereof shall suffer imprisonment not exceeding ten years, and be fined not exceeding ten thousand dollars: *Provided, however,* That the Secretary of the Treasury shall have power to remit any fines, penalties, or forfeitures, or to compromise the same, in accordance with existing law."

The point on which my opinion is desired I understand to be, whether the prohibition against compromising or abating any claim of the United States for any fine, penalty, or forfeiture incurred by a violation of the customs-laws contained in the section above quoted applies to arrangements made by the district attorney, of his own authority and upon his

Testimony of Accomplices.

official responsibility, for obtaining the testimony of accomplices in *criminal cases*, whereby the accomplice, called as a witness in behalf of the Government, is assured that he will not be prosecuted if he makes an honest disclosure of the facts at the trial.

I do not think that the prohibition is applicable to arrangements of that sort. The necessity for admitting the testimony of accomplices is universally recognized, it being often impossible to bring the principal offenders to justice without this kind of evidence. To take away the means of securing such testimony would be equivalent to an inhibition of its use, and from this the most mischievous consequences would ensue, because (as was remarked by Lord Chief-Justice Abbott, see 33 How. St. Tr., 639) it would not only happen that many heinous crimes and offenses would pass unpunished, but great encouragement would be given to bad men by withdrawing from their minds the fear of detection and punishment through the instrumentality of their partners in guilt, and thereby universal confidence would be substituted for that distrust of each other which naturally possesses men engaged in wicked purposes, and which operates as one of the most effectual restraints against the commission of those crimes to which the concurrence of several persons is required.

Thus, the public interests, as well in regard to the prevention of crime as in regard to its punishment, are deeply concerned in the existence of some means whereby the testimony of accomplices may be secured for the Government; and I cannot believe that Congress intended by the aforesaid section to prevent the prosecuting officer from making use of what experience has shown to be the only practicable means which is available to that end, viz, the giving an assurance to the accomplice, who is to be used as a witness, of exemption from prosecution in case he acts in good faith and makes a full disclosure.

I am, sir, very respectfully, your obedient servant,
GEO. H. WILLIAMS.

Hon. B. H. BRISTOW,
Secretary of the Treasury.

Internal Revenue—Claims for Refund on Stamps.

INTERNAL REVENUE—CLAIMS FOR REFUND ON STAMPS.

Stamps or stamp-duties come under the provisions of section 3228 of the Revised Statutes, imposing a limitation on claims for the refunding of internal taxes; and hence claims for a refund of money paid for stamps must be presented to the Commissioner of Internal Revenue within two years from the time they have accrued, otherwise they will be barred.

Where a trust-deed was executed to secure certain bonds, and duly stamped and delivered, but the bonds not having been issued as contemplated, the deed was subsequently canceled, and in lieu thereof a new trust-deed and bonds of another description were thereupon executed and delivered: *Held* that the case of the first-mentioned deed is within the provisions of section 3426 of the Revised Statutes, and presents a case for allowance by the Commissioner, unless barred by section 3228.

DEPARTMENT OF JUSTICE,

January 7, 1875.

SIR: In your letter bearing date December 31, 1874, at the suggestion of the Commissioner of Internal Revenue, you ask my opinion upon the following question: "Are claims for an allowance for stamps, under section 3426, Revised Statutes, (section 161 of the act of June 30, 1864, as amended by section 41 of the act of June 6, 1872,) barred by the provisions of section 3228, Revised Statutes, (section 44, act of June 6, 1872,) when not presented within the time prescribed by said section?"

I give an affirmative answer to the question. Section 3228, Revised Statutes, like section 44 of the act of June 6, 1872, from which it is taken, is intended to be and is an act of limitation upon all claims for the refunding of internal taxes. A stamp or a stamp-duty is a pecuniary burden laid upon a specific thing by governmental authority for the support of the Government; and this is the definition of a tax. The terms "stamp-duty" and "stamp-tax" are used interchangeably in the internal-revenue laws, as meaning the same thing. There can be no rational doubt that stamps or stamp-duties are internal taxes. They are, therefore, within the meaning of sec. 3228, Revised Statutes; and claims for a refund of money paid for them must be presented to the Commissioner of Internal Revenue within two years from the time the claims or "causes of action" accrue, and if not so presented they are barred.

Again, a case is stated in your letter as follows: "July 15,

Internal Revenue—Claims for Refund on Stamps.

1871, a deed was executed by the Atlantic and Lake Erie Railway Company, conveying its property to a trustee, in trust, to secure the payment of certain coupon-bonds, which, at that time, it purposed to issue. The deed was stamped at the rate of one dollar for each and every thousand dollars of the proposed bonds, and was delivered to the trustee and duly recorded. None of the bonds described in the deed were ever issued, but the company canceled both the trust-deed and the bonds, and, in lieu thereof, a new trust-deed and new bonds, of another description, were executed and delivered." And the question is, whether this case falls within the provision of section 3426, Revised Statutes.

The trust-deed first mentioned was intended to be a security for money loaned to the company, of which loan the bonds set forth in the deed, when issued, would be the evidence. This was its sole purpose. Until the bonds were issued, the deed, though delivered, was of no force or significance. It conveyed no interest to the trustee or anybody else. It had no vitality. There was certainly no necessity for stamping the paper, for it had not yet come into life as a conveyance. The action of the company in stamping, delivering, and recording it, was premature. Error or mistake was discovered in the transaction, and both deed and bonds were canceled. Now, the conveyances which the law of 1864 required to be stamped were such as conveyed some interest, or for which some consideration was given, and the stamp was a tax upon the value of the interest conveyed, or upon the amount of money borrowed, in case of a mortgage or a deed of trust made for the security of a loan. But this paper was a nullity; it conveyed nothing, it secured nothing.

I am of opinion, therefore, that the case is fairly within the words and intent of section 3426, Revised Statutes. The stamps were "through mistake unnecessarily used, and the rates or duties represented by them were paid in error." And I think it is a case for an allowance by the Commissioner, unless the claim is barred by section 3228, according to the view thereof above expressed.

I am, very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. B. H. BRISTOW,

Secretary of the Treasury.

Payment of Cotton-Claims at the Treasury.

PAYMENT OF COTTON-CLAIMS AT THE TREASURY.

The words "lawful owners," as employed in the 5th section of the act of May 18, 1872, chap. 1872, signify such persons as have a legal interest in the proceeds of the cotton or in any portion thereof; that is to say, first, the holders of the absolute legal title to the cotton at the time of its seizure; and, second, those who had possession in a representative capacity, with a lien for services or for advances and expenses.

The claimant of a purely equitable interest, (i. e., one who can only claim through a trustee, the legal title being in the latter,) cannot, in *general*, be deemed the lawful owner within the meaning of the act. Exceptions hereto indicated.

The executors or administrators of deceased lawful owners are their legal representatives; but these may also, under some circumstances, be the heirs or next of kin of such owners.

It is not the duty of the Secretary, under said act, to decide between conflicting claims on equitable grounds alone; and in a contest between a trustee and a beneficiary, the former is entitled to possession where the trust remains unexecuted and possession is necessary to enable him to execute it.

In May, 1863, one H., a resident of Arkansas, being the owner of certain bales of cotton, sold and delivered the same to the Bank of Chattanooga, Tennessee, receiving therefor the price agreed upon. Afterward these bales, (the name of the cashier of the bank being marked thereon,) while in his possession, were unlawfully seized by the agents of the United States, sold, and the proceeds turned into the Treasury. By a law of Tennessee, in force at the time of the sale, banks of that State were prohibited from using or employing any of their moneys in trade or commerce: *Held* that, notwithstanding said law, the purchase was valid as between H. and the bank, and consequently that, as between them, the latter was lawful owner of the cotton when seized.

However, assuming that the purchase in that case, although in the name of the bank, was in fact made by the bank (not with its own funds, but) with the funds of a third party, or with funds belonging to the estate of a decedent, the ownership of the cotton was in the estate or party with whose money it was bought.

The seizure of cotton by an authorized agent of the Treasury Department does not raise a conclusive presumption that the proceeds thereof went into the Treasury.

DEPARTMENT OF JUSTICE,

January 21, 1875.

SIR: I have considered attentively the subject of your communication of August 20, 1874, in which you request my opinion upon certain questions having reference to the practical administration of the 5th section of the act of Congress of May 18, 1872, (17 Stat., 134.)

Payment of Cotton-Claims at the Treasury.

The act provides that the net proceeds of "all cotton seized after the 30th day of June, 1865, by the agents of the Government unlawfully, and in violation of their instructions," shall be paid directly to the "lawful owners" of said cotton or to their legal representatives.

You ask, first, "Who are to be deemed the lawful owners, or what constitutes lawful ownership under the act?"

The statute is a remedial one. It provides a summary process, for those who claim to have been the owners of the cotton, to reach the proceeds of it, to wit, direct application to the Secretary of the Treasury. He is made the final judge and executor of the law, and there is no appeal from his decision. It was evidently the intention of Congress that the Secretary should pay over the proceeds to those who have a legal right to the immediate possession of them. They are the lawful owners intended by the act who have a legal interest in the proceeds or any portion of them. And by this I mean, primarily, the holders of the absolute legal title to the cotton at the time of its seizure; and, secondly, those who had possession in a representative capacity, with a lien for services or for advances and expenses. I refer to the case of *The United States vs. Villalonga*, on appeal from the Court of Claims. In this case, it has been held by the Supreme Court, at its present term, that "the owner spoken of in the 3d section of the captured and abandoned property act having a right to the proceeds thereof is he who has the *legal interest* in those proceeds, and a factor who made advances before the capture can at most recover only to the extent of his lien." The court decides that the holder of the legal title is the "owner" entitled to the proceeds of the property under the act of March 12, 1863, but does not exclude the lien-holder from the benefit of its provisions.

Secondly, you inquire, "Is the owner of a purely equitable interest a lawful owner within the meaning of the statute?"

By the owner of a purely equitable interest, I understand one who can claim only through a trustee, the legal interest being in the latter; and, generally, I should say that the trustee is the lawful owner intended by the act; and yet, if the purpose of the trust has been entirely accomplished, as in case of an estate which has been settled, the debts all paid,

 Payment of Cotton-Claims at the Treasury.

and nothing remains but that the heirs or next of kin should take the assets, I think these may well be considered the lawful owners, especially if it should appear that the administrator has been discharged.

Third, "Who are to be deemed legal representatives of lawful owners?"

I answer, that the legal representatives of deceased persons who were lawful owners are generally their executors or administrators, but may be their heirs or next of kin. (See 3 Opin., 29-43; 7 Opin., 60; *Mrs. Stanton's Case*, 4 N. & H., 456; *Carroll's Case*, 13 Wall., 351.)

Fourthly, you inquire whether "it is obligatory upon the Secretary to decide between conflicting claims upon equitable grounds alone."

Generally, I think, it is not. If I apprehend correctly the purport of the question, it is substantially covered by my answer to the second. In a contest between the trustee and the beneficiary, the former is entitled to possession if there remains in him any real living interest; if he has, in other words, any duty to perform under the trust, and possession is necessary to enable him to execute it.

I come now to consider your second series of questions, which are based upon certain assumed facts or allegations of fact, as set forth in your letter.

First. You ask, "Was the sale by Hamiter to the bank, being valid in other respects, rendered invalid or void by reason of the statute of Tennessee," hereinafter cited? And

Second. "Who is the lawful owner of the proceeds of the cotton as between Hamiter and the bank?"

These questions may be considered together. The facts upon which they are raised may be briefly stated thus: David Hamiter, of Sevier County, Arkansas, was the original owner of certain cotton. In May, 1863, he sold and delivered 104 bales thereof to the Bank of Chattanooga, and received therefor the price agreed upon. Afterward these bales of cotton, marked "Fulton," (the name of the cashier of the bank,) while in his possession, were unlawfully seized by the agents of the United States, sold, and the proceeds went into the Treasury. By the 5th section of the act of 1859-'60, passed by the legislature of the State of Tennessee, it is made

Payment of Cotton-Claims at the Treasury.

unlawful for the banks of that State "to use or employ any of their moneys * * * in trade or commerce." (1 Thompson & Stiger's compilation of the Stats. of Tennessee, p. 858.)

Upon these facts, I am of opinion that the purchase by the Bank of Chattanooga was valid as between it and Hamiter. If in using its funds in the purchase of cotton the bank violated the law of Tennessee, it was answerable to that State, and might no doubt have been visited with such penalties as her laws provide. But having paid for and taken into its possession the cotton, without fraud alleged or suggested, the bank was the lawful owner as between it and Hamiter, the vendor. *The contract was executed.* It would be monstrous to hold that, after a fair sale of property, the price agreed on paid to the vendor, and a complete delivery by him, he might still turn round and claim title upon any pretense whatever.

Thirdly. You inquire, "Assuming the purchase to have been in fact made with funds other than those of the bank, although in its name, will this circumstance defeat the title alleged to have been thus acquired, in view of the statute of Tennessee above cited?"

I think the title to the cotton after its purchase was in the party with whose money it was bought, and that the statute of Tennessee may be laid entirely out of view. As an element in the case, I do not regard it as of any importance.

Fourth. "Assuming the purchase to have been valid, but made with funds belonging to the estate of Benjamin Easley, to whom in that case do the proceeds belong, and who is entitled to demand and receive the same from the Secretary of the Treasury?"

Upon the hypothesis stated, the cotton was the property of the estate of Easley; and if it should *clearly* appear that there are no debts of that estate, the administrator removed, and that there are no claimants showing a substantial interest in it except the heirs, they are the lawful owners, and entitled to the proceeds of the cotton. And, further, if it should be made *clearly to appear* by the adjudication of a local court of competent jurisdiction, and having jurisdiction of the parties, or if it is otherwise shown, that all interest in the property of

Payment of Cotton-Claims at the Treasury.

Easley's estate is concentrated in one of his heirs, then the said proceeds should be paid to that person. On the other hand, if there should be any serious doubt whether there are not existing in other parties substantial claims against said estate, it would be just to all parties, and much safer, to pay the money to an administrator *de bonis non* of Easley's estate, when one duly qualified shall appear.

Fifth. Your last inquiry reads as follows: "Does the seizure by an authorized agent of this Department create a conclusive presumption that the proceeds of cotton so seized went into the Treasury, in the absence of any record evidence of such fact?"

A *conclusive* presumption is one that cannot be overcome by evidence to the contrary. Such a presumption, that the proceeds of cotton went into the Treasury, is not raised by the seizure of it by an authorized agent of the Government. Sec. 5 of the act of May 18, 1872, (17 Stat., 134,) directs the Secretary of the Treasury, in the cases therein provided for, to pay the "net proceeds, without interest, of the sales of said cotton *actually* paid into the Treasury." I should think, under the peculiar phraseology of this section, that the claimant must show that the money claimed was in the Treasury before the Secretary would be authorized to refund it; but, as bearing upon this question, I respectfully refer to the decision of the Supreme Court in the case of *The United States vs. Crussell*, (14 Wall., 1,) in which the abandoned and captured property act (12 Stat., 820) is construed. I also refer to the decision of the Court of Claims in the case of *Silvie vs. The United States*, (7 N. & H., 278,) which decision was affirmed by the Supreme Court without any opinion, in consequence of an equal division of the judges as to the law of the case.

Very respectfully,

GEO. H. WILLIAMS.

Hon. B. H. BRISTOW,
Secretary of the Treasury.

Property of Deserting Seamen.

PROPERTY OF DESERTING SEAMEN.

Four seamen deserted from an American merchant-vessel in a foreign port, leaving in the hands of the master, besides what was due them as wages, some clothing and other effects, all of which the master delivered to the United States consul at the port on the demand of the latter. By instructions from the State Department, the consul sold the clothing, &c., and forwarded the proceeds thereof, with the amount due the seamen as wages, to that Department. No proceedings have been instituted against the seamen for the offense of desertion. Upon the question as to what disposition should be made by the Department of the money: *Advised* that the funds, together with a statement of such facts touching the case as may be in the possession of the Department, be transmitted to the circuit judge for the district wherein the port is in which the vessel is owned or at which her voyage terminated.

A consul has no authority to demand and receive from the master of a vessel the money and effects belonging to a deserter from the vessel.

The steps which should be taken by the master, with reference to the disposition of such property, indicated.

DEPARTMENT OF JUSTICE,
January 28, 1875.

SIR: From your communication of the 20th instant, I gather the following facts, which seem to be material to a consideration of the questions submitted by you:

In the month of September, 1874, four seamen deserted from the bark *Bolivia* at the port of Rotterdam, whither she had arrived after a long voyage. The vessel was American, out of the port of Boston. Each of the deserters left an amount of money due them as wages, and some clothing and other effects, in the hands of the master of the vessel. He delivered the money, clothes, &c., to the United States consul at Rotterdam, at his request. Under instructions from the Department of State, the consul sold the clothing and other effects of the deserting seamen, and forwarded the proceeds, together with the money due them as wages, to that Department, which now holds the fund. No proceeding has been instituted against the men for the crime of desertion, and there has been no judgment of forfeiture.

The questions are: What disposition should be made of this money, and what course should be pursued in similar cases?

Property of Deserting Seamen.

I have first to observe that the consul acted without warrant of law in demanding and receiving from the master of the vessel the money and effects of the deserters. It is only in case of the death of a seaman, and under the circumstances indicated in the second division of section 4539, Revised Statutes, that any consular officer is authorized to require the money, wages, &c., of a seaman to be delivered to him.

The proper steps for the master of the vessel to have taken on the desertion of the men are pointed out in sections 4597, 4599, and 4604, Revised Statutes. If he was unable to find and arrest them, it was his duty to take charge of and hold their clothes, effects, and wages until his arrival at the port at which his voyage terminated. At that port, which I suppose was Boston, he should, although no forfeiture was as yet declared, have delivered the balance of the property, after deducting the expenses occasioned by the desertion, to the shipping-commissioner, to be by him paid over to the judge of the circuit court of the United States for the district of Massachusetts; for the property was held by the master as forfeited, and the law forbids the master or owner of the vessel to keep it, but directs that it shall be held by the judge of the circuit court for the purposes indicated in sections 4604 and 4610, Revised Statutes. The law does not require that there shall be an actual judgment of forfeiture before it becomes the duty of the master to pay over to the shipping-commissioner. If it were so, there would seldom be a case of forfeiture, and the fund for disabled seamen would not be benefited largely from this source.

Undoubtedly, upon being put in possession of the facts, the circuit judge would, in a case like the present, direct the district attorney to proceed according to law to obtain a judgment. But if the deserters should not appear, and cannot be found in due time so that service can be had upon them, I think the law requires that the money and the proceeds of the effects left by them with masters of vessels, after deducting expenses, &c., should go into the Treasury, to be added to the fund for the relief of sick, disabled, and destitute seamen. (Sections 4545, 4604, and 4610, Rev. Stat.)

In the present case I would advise that the fund should be transmitted, together with such facts and evidences touching

Imprisonment of Convicts of Consular Courts.

the case as may be in the possession of the Department of State, to the circuit judge for the district in which the port is where the bark Bolivia was owned, or at which her voyage terminated; and this, because such would have been the destination of the fund if the course pointed out by the law had been pursued, and for the further reason that the deserting men may yet appear and, peradventure, show that their desertion was excusable, as in the case indicated in section 4600, Revised Statutes, or prove such a state of facts as would induce the judge to reduce the penalty.

I am, very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. HAMILTON FISH,

Secretary of State.

IMPRISONMENT OF CONVICTS OF CONSULAR COURTS.

In the case of consular courts clothed with criminal jurisdiction, as in the case of other courts invested with similar jurisdiction, the rule applies, that a sentence of imprisonment cannot be legally executed beyond the territorial jurisdiction of the court which pronounced it, unless authority thus to execute the sentence is conferred by the legislature.

Hence, in the absence of any law giving power to send the convicts of the consular courts at Smyrna and Constantinople to this country for imprisonment, if such convicts were brought to the United States for that purpose they could not legally be held.

Seem that, under present statutory provisions, (see Revised Statutes, sections 4121 to 4125, inclusive,) it is contemplated that the sentences of those courts, pronounced in the exercise of their criminal jurisdiction, are to be executed only in the country where the trial and punishment were had.

DEPARTMENT OF JUSTICE,

February 4, 1875.

SIR: Your communication of the 9th ultimo, in relation to three American citizens who have recently been convicted of forgery by the United States consular court at Smyrna, and another American citizen who has been convicted of the same offense by the United States consular court at Constantinople, presents for my consideration the question "as to whether, if those convicts were to be transferred to this country for imprisonment during the terms for which they were sentenced, they could lawfully be held for that purpose."

Imprisonment of Convicts of Consular Courts.

Assuming that, so far as the Ottoman government is concerned, no objection to the transportation of the convicts to this country for the purpose mentioned could properly be urged under subsisting treaty provisions, the answer to the above question appears to me to depend entirely upon whether there is any law of the United States which authorizes the sentences passed by the said consular courts, in the exercise of their criminal jurisdiction, to be carried into effect here.

With regard to courts exercising criminal jurisdiction, by authority of Congress, in the States and Territories, it has been deemed necessary that there should be some legislative provision to warrant the imprisonment of convicts of those courts outside of their respective judicial districts where local or other circumstances make it expedient to adopt this course, and instances of such a provision are found in the statutes. (See the 1st section of the act of March 27, 1854, chap. 26; the 1st section of the act of March 28, 1856, chap. 9; and the 1st section of the act of May 12, 1864, chap. 85.) The legislation just referred to proceeds upon the idea that, unless previously authorized by statute to be so carried into effect, a sentence of imprisonment could not be legally executed beyond the territorial jurisdiction of the court which pronounced it; and this accords with a familiar principle of law.

In the case of consular courts vested with criminal jurisdiction, the same rule would seem to apply; so that, to warrant a sentence of imprisonment passed by one of those courts to be executed beyond the territorial jurisdiction thereof, it may be regarded as absolutely essential that there exist at the time authority thus to execute the sentence conferred by the legislature.

After careful examination, I have been unable to find any law giving power to send to this country the convicts of either of the consular courts in question, in order that the sentence of imprisonment pronounced thereby may be carried into effect here. On the contrary, the existing statutory provisions on the subject appear to contemplate that such sentences are to be executed only in the country where the trial and conviction were had. (See Rev. Stat., sections 4121

Navy Pension-Fund.

to 4125, inclusive.) I am accordingly brought to the conclusion that were the convicts mentioned in your communication to be transported to the United States for imprisonment they could not legally be held.

I have the honor to be, very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. HAMILTON FISH,
Secretary of State.

NAVY PENSION-FUND.

Where a district court, by its decree, ordered certain money to be distributed as proceeds of prize, one-half to the captors and the other half to the "Navy pension-fund;" and at a subsequent term of the court, the distribution of the money having in the mean time been made as thus ordered, altered its decree by ordering all the money to be paid to the captors as military salvage: *Held* that, as to the money in question, viz, the amount distributed to the "Navy pension-fund," the modified decree was of no effect and void; the funds having then already passed out of the jurisdiction and control of the court. (*Cf.* opinions of Attorney-General Akerman of August 1 and December 6, 1870, in 13 Opin., 299, 348.)

DEPARTMENT OF JUSTICE,
February 5, 1875.

SIR: I have the honor to acknowledge the receipt of your letter of January 14, 1875, in which you request my opinion upon the case therein stated.

The facts are briefly these: A prize-court by its decree ordered prize-money to be distributed, one-half to the captors, the other half to the "Navy pension-fund." The distribution was so made and the decree fully executed. Subsequently the court altered its decree, and ordered all the money as military salvage to be paid to the captors.

The question is: What effect has the amended decree upon the moneys distributed to the Navy pension-fund, and what is the duty in the premises of the Secretary of the Navy as the trustee of that fund?

I assume that by the word "subsequently" in your letter you intend *at a subsequent term*, and that the fact is that the decree was altered at a term of the court subsequent to that in which it was first rendered.

Navy Pension-Fund.

The law applicable to the case was early laid down, in substance, thus: During the term wherein any judicial act is done it remains in the remembrance of the court, and it may be altered or vacated, as in the opinion of the court justice requires. But when that term is passed the control of the court over the record ceases, and its judgments, decrees, or other judicial acts admit of no alteration, averment, or proof to the contrary. In more modern times the rule has been modified, and it is now held that courts have the power at subsequent terms to set right matters of mere form in their judgments, to correct misprisions of their clerks and what may be regarded as clerical mistakes, so as to conform the record to the truth, and any amendments permissible under the statutes of jeofails may be made. Judgments obtained by fraud may be vacated at a subsequent term. (3 Black. Com., 407. *Bank of the United States vs. Moss*, 6 How., 31.)

But no court can alter, reverse, or annul its own final judgments or decrees rendered on the merits, *for error of fact or law*, after the term in which they have been entered of record. Even want of jurisdiction was held to be not a sufficient ground for setting aside, on motion only, a final judgment entered at a former term. (*Steamboat New England*, 3 Sumner, 495; *Ex parte Sibbald vs. The United States*, 12 Pet., 492; *Cameron vs. McRoberts*, 3 Wheat., 591; *Charman vs. Charman*, 13 Vesey, 115; *Assignees of Medford vs. Dorsey*, 2 Wash., C. C. Rep., 433; *Bank of the United States vs. Moss*, 6 How., 31; *Cook vs. Wood*, 24 Ills. Reps., 295; *Hill vs. Saint Louis*, 20 Missouri Rep., 584.)

In this case, as it is presented, the court's order distributing the money as prize-money was a decision disposing of the whole cause upon its merits. The decree was final as to all parties. No fraud or irregularity in obtaining it is alleged or suggested. At a subsequent term by the same court there is an attempt for supposed error in law to reverse the decree, or that portion of it which gave part of the money to the Navy pension-fund, and this after the money had been paid over in accordance with the decree. It was too late. The cause and the subject-matter of it were then out of the jurisdiction of the court and beyond its control. By the original decree this money had become part and parcel of the Navy pension-

Claim of George M. Giddings.

fund. It belongs to that fund; and it is the duty of the Secretary of the Navy as trustee to hold and protect it. He can do nothing toward carrying out the order of the amended decree, which, as to him, and as to the money in question, is without effect and void.

I am, very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. Geo. M. ROBESON,

Secretary of the Navy.

CLAIM OF GEORGE M. GIDDINGS.

The question proposed in this case—which has special reference to the provision in section 3480 of the Revised Statutes, prohibiting the payment of certain claims which existed prior to April 13, 1861, and is in substance whether the claimant's demand "accrued or existed" prior to that date—being regarded as purely a question of fact, to be made out from the evidence presented, and not in any aspect a question of law, the Attorney-General declines giving an opinion thereon.

DEPARTMENT OF JUSTICE,

February 16, 1875.

SIR: I have the honor to acknowledge the receipt of your letter of the 12th instant, inclosing a communication from the Second Comptroller, together with a statement prepared by him in relation to the claim of George M. Giddings, of San Antonio, Texas, and requesting an opinion from me upon the question suggested by the Comptroller in respect to that claim.

It appears by the Comptroller's statement that on the 24th of February, 1861, Lieutenant-Colonel John B. Grayson, commissary of subsistence, United States Army, who was then stationed at Santa Fé, New Mexico, drew a check on the assistant treasurer at New York, payable to the order of Lieutenant O. B. Stivers, United States Army, and delivered it to the latter. Lieutenant Stivers, the payee, afterward transferred it by indorsement to Lieutenant W. B. Lane, United States Army. The issuing of the check to Lieutenant Stivers, and the indorsement thereof by him to Lieutenant Lane, were done solely for the purpose of effecting transfers of public funds to these officers. Subsequently, however,

Claim of George M. Giddings.

Lieutenant Lane transferred it by an indorsement in blank, to a private person, "in the regular course of business relating to the Commissary Department."

Mr. Giddings, the claimant, is the present holder of the check, and avers that he received it in the month of May or June, 1861, in payment for goods at El Paso, Texas, where he was then doing business as a trader. He resided in Texas during the rebellion, and actively participated therein against the Government of the United States; but his legal and political disabilities, imposed by the 14th amendment of the Constitution, have been removed by the act of March 7, 1870, chap. 24.

Section 3480 of the Revised Statutes, (which reproduces the provisions of the joint resolution of March 2, 1867, and supersedes the same,) prohibits the payment of "any account, claim, or demand against the United States which accrued or existed prior to the 13th day of April, 1861, in favor of any person who promoted, encouraged, or in any manner sustained the late rebellion, or in favor of any person who during such rebellion was not known to be opposed thereto, and distinctly in favor of its suppression."

I find that the only question upon which my opinion is desired, so far as disclosed by the papers before me, is substantially the following: Whether the claim of Mr. Giddings "accrued or existed" prior to the date last mentioned, viz, April 13, 1861.

This question is proposed in view of, and has special reference to, the statutory provision quoted above, prohibiting the payment of demands which existed before that date, and it seems to have been prompted by a doubt entertained by the Comptroller as to the period when the aforesaid claim accrued; in other words, whether such period was or was not prior to that date. But it is very plain that the inquiry, whether the claim accrued prior to the date designated or not, is purely a question of fact, to be made out from the evidence presented, and is not in any aspect a question of law; and questions of the former character do not fall within my province to determine.

I therefore beg to be permitted to decline giving any opinion on the question suggested by the Comptroller;

Internal-Revenue Stamps.

though, with regard to the case to which it relates, I think it proper for me to state that, in my judgment, the period when the claim accrued is not controlled by the date of the check, but by the date of the transaction wherein it was used by Lieutenant Lane for the purpose of payment.

The papers which accompanied your letter are returned herewith.

I have the honor to be, very respectfully,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,

Secretary of War.

INTERNAL-REVENUE STAMPS.

In placing the portraits of living persons upon *internal-revenue stamps* there is really no infraction of the provisions of section 3576 of the Revised Statutes; nor are such ornaments forbidden to be placed on such stamps by any other legislative enactment; yet their exclusion therefrom would seem to be in consonance with the spirit of said section.

DEPARTMENT OF JUSTICE,

February 15, 1875.

SIR: In your communication of February 1, 1875, you ask my opinion upon this question: "Whether in placing portraits of living persons upon internal-revenue stamps there has been an infraction of that portion of the law (Revised Statutes, section 3576) which declares that no portrait shall be placed upon any of the bonds, securities, notes, fractional or postal currency of the United States, while the original of such portrait is living."

Prior to the enactment of the Revised Statutes it was held, and, as I think, rightly held, by the Internal-Revenue Bureau to be lawful to ornament with the effigies of living persons the stamps used by the Government in collecting its internal revenue. These stamps are not bonds, notes, or United States currency of any kind, nor yet are they in the ordinary or in any just sense United States securities. Congress, however, in section 5413 of the Revised Statutes has declared that the form of words "obligation or other security of the United States" shall be held to include all representatives of

Internal-Revenue Stamps.

value issued or to be issued by the Government, and in the enumeration of the particulars which by the statutes are embraced by those words stamps are expressly included.

This section (5413) is a re-enactment of the 13th section of the act of June 30, 1864, (13 Stat., 222.) The first nine sections of this act are taken up with provisions for the borrowing of money, issuing bonds, notes, fractional currency, &c. In these sections the phrase under consideration is not once used. The 10th, 11th, and 12th sections prescribe the punishment to be inflicted for counterfeiting, forging, altering, &c., "any obligation or other security of the United States." The 13th section is then added, defining the phrase, and declaring that as "*used in this act*" it shall be held to include the things enumerated. The form of words above quoted seems to have been chosen to denote generally the things the counterfeiting of which the act sought to punish, and then by definition all the particulars are swept into it, stamps among the rest. So, then, *for the purposes of the act only*—that is, to punish the crime of counterfeiting or in any way falsely altering stamps, just as the counterfeiting or falsely altering other issues of the Government is punished—stamps were by this statute brought within the meaning of the phrase in question.

In section 5413 of the Revised Statutes the definition of the phrase is not by *express words* limited to its use in any other particular section or sections. It is, however, placed at the head of one of the divisions under the general title "*Crimes*," the division, namely, of "Crimes against the operations of the Government." The phrase, too, in section 5413 is marked as a quotation, evidently referring to it as used in certain subsequent sections of the same division of the crimes act, to wit, sections 5414, 5430, 5431, which are taken from the same act of June 30, 1864, (13 Stat., 221, 222) and sections 5432 and 5434, which are *in pari materia*, and are taken from the act of February 5, 1867, (14 Stat., 383.) These sections all deal with the crime of falsely altering the paper issues (representatives of value) of the United States, and with cognate offenses. I do not find precisely the same form of words as that defined in section 5413 in any other sections, (except those cited above,) in the same division of the title "*Crimes*," or indeed elsewhere, in the Revised Statutes.

North German Lloyd Steamship Company.

These circumstances, viz, the connection in which the section defining the phrase is placed, the marks of quotation referring it to the particular sections above cited, the subject-matter of those sections, and the fact that the same form of words is not found except in those parts of the law which have to do with crimes, and particularly the crime of forgery, warrant the conclusion that *beyond* those parts of the Revised Statutes the wide signification given by section 5413 to the words "obligation or other security of the United States" does not extend. It was not the intention of Congress, except in those parts of the criminal law above indicated, to give to the word "stamps" a meaning which neither its etymology nor its ordinary use warrants.

While I am of the opinion that the exclusion of the portraits of living persons from revenue-stamps is consonant to and in furtherance of the spirit of said section 3576, I cannot hold that said section requires such exclusion, or makes illegal stamps with the portraits of living persons upon them.

I am, very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. B. H. BRISTOW,
Secretary of the Treasury.

NORTH GERMAN LLOYD STEAMSHIP COMPANY.

Provisions of the 9th article of the treaty with the Hanseatic Republics of December 20, 1827, together with the provisions of the 4th article of the treaty with Belgium of July 17, 1858, considered with reference to the question whether the North German Lloyd Steamship Company is entitled to a refund of the tonnage-tax collected in ports of the United States on that company's steamers, whose home-port is Bremen; and *held*, upon the facts presented, that the steam-vessels of Bremen plying regularly between that port and the United States have, during the entire period subsequent to the date of the ratification of said treaty with Belgium, been exempt from such tax in American ports by force of the 9th article of said treaty with the Hanseatic Republics; *held*, also, that where the tax has been exacted and collected from such vessels in American port, at any time within that period, it should be refunded.

DEPARTMENT OF JUSTICE,

February 20, 1875.

SIR : I have the honor to acknowledge the receipt of a com-

North German Lloyd Steamship Company.

munication from Hon. Charles F. Conant, Acting Secretary, of date February 8, 1875, transmitting the application of Oelrichs & Co., agents of the North German Lloyd's Steamship Company, for the refund of certain moneys paid by them on the 14th of August, 1866, as tonnage-duties on that company's steamship New York, at the port of New York.

The Acting Secretary quotes the 4th article of the treaty of July, 1858, between the United States and Belgium, (12 Stat., 1045,) as follows: "Steam-vessels engaged in regular navigation between the United States and Belgium shall be exempt in both countries from the payment of duties of tonnage, anchorage, buoys, and light-houses." Also, the 9th article of the treaty of December 20, 1827, between the United States and the Hanseatic Republics, (8 Stat., 370,) the material part of which is as follows: "The contracting parties * * * * * engage mutually not to grant any particular favor to other nations in respect of commerce and navigation, which shall not immediately become common to the other party, who shall enjoy the same freely if the concession was freely made, or on allowing the same compensation if the concession was conditional."

It is further stated that, as the result of an application to the Treasury Department, made by the minister of the German Empire, through the Secretary of State, and on satisfactory evidence that the senate of Bremen had freely made the concession required by the above-quoted article, and that no tonnage had been collected at that port of United States steamers engaged in regular navigation between Bremen and this country, the Treasury Department issued its orders in January, 1873, exempting the steamships of the North German Lloyd Company, whose home-port is Bremen, from payment of further tonnage-tax. It is also stated that, under the above-recited article of the treaty with Belgium, the Treasury Department refunded, February 17, 1872, a tonnage-tax, which had in contravention of said article been exacted in the port of New York from the Belgian steamship *De Ruyter*. Referring, then, to my opinion of October 24, 1874, in the case of the "Norse American line" of steamers, (see *ante*, p. 468,) in which opinion the principal question arising upon the above-recited facts is passed upon, the Acting Sec-

North German Lloyd Steamship Company.

retary propounds this further question : Whether the North German Lloyd Steamship Company is entitled, "provided there be no other bar to repayment," to be refunded "the tonnage-tax collected on its steamers in ports of the United States *prior to the date of the concession made by the senate of Bremen.*"

It is certified in a paper dated May 29, 1872, emanating from the government of Bremen, (which paper seems to be admitted as conclusive evidence of the facts stated therein,) that "on the side of Bremen since 1847, when the first American steamship line between the United States and Bremen was established, neither tonnage-dues nor any similar tax on the vessels of American steam-lines was ever imposed." It appears, then, that the "concession" was in fact freely made more than ten years before the date of the treaty with Belgium, and, indeed, that Bremen has never demanded tonnage or any similar tax of regular American steamers. No date, then, can be assigned to the "concession" on the part of Bremen. But the same paper gives assurance that the authorities of Bremen will not in the future impose tonnage on American steamships regularly plying, &c., so long as her own vessels enjoy similar freedom in the United States. It is the date of this paper, May 29, 1872, which is supposed to be referred to as "the date of the concession made by the senate of Bremen." If I am right in this supposition, the question is merely one of notice—whether the government of Bremen, in order that her regular steam-navigation might enjoy exemption from tonnage in the ports of the United States, should have given notice to the United States after the ratification of the treaty with Belgium that she had always conceded the exemption to American steam-vessels, and that she had no intention of imposing any such tax upon them while Bremen steamships enjoyed the same freedom in American ports.

Now, Bremen was not a party to the treaty with Belgium, and was not necessarily cognizant of the provision thereof in which she was collaterally interested; but the United States had that knowledge, and if formal notice from either the United States or Bremen, of the provision aforesaid, and of compliance therewith, was necessary, it would seem that

North German Lloyd Steamship Company.

notice should have been *first* given by the United States to Bremen. The government of Bremen would then, probably, have answered, giving the facts and the assurances contained in the paper above quoted. However this may be, when the *essential fact* is unquestioned, (which could not have escaped the knowledge of the United States,) that Bremen has all along been conceding the exemption, it hardly comports with that scrupulous regard for the obligation of treaties which this nation has always cherished to stand upon a point so technical, not to say so trivial, as that of the want of formal notice from Bremen. The condition having been fully performed on her part, her regular steam-navigation is entitled to reciprocal performance in the ports of the United States. In other words, the steam-vessels of Bremen from and after the ratification of the treaty with Belgium were, by the provision of the 9th article of the treaty of December 20, 1827, exempt from tonnage-dues and similar taxes in the ports of the United States; and if in contravention of that article such taxes have been exacted, it is not a valid objection to their being refunded that Bremen did not give formal notice to the United States that the regular steam-navigation of the latter was in like manner exempt in the ports of the former.

Again, it is inquired, "Whether they [steam-vessels from the port of Bremen] are entitled to such refund of sums paid as tonnage-tax prior to the date of the refund of tonnage-tax to the owners of the Belgian steamship *De Ruyter*?" I do not see that the case of the *De Ruyter* has any bearing upon this case, except that it may be authority for the position that the Secretary of the Treasury has power to refund tonnage-taxes exacted in contravention of treaty stipulations. The obligation of the United States to admit to the ports of this country steam-vessels from Bremen, tonnage-free, was complete before the *De Ruyter* case arose.

Lastly, the Acting Secretary propounds this question: "Are they [Bremen steamers] entitled to a refund of money paid as tonnage-tax as far anterior as the date of the first exactions of the tax from the steamships of Bremen lines engaged in regular navigation?" A categorical answer to this question cannot be given, for it is not stated, nor is there any fact before me fixing the time, when such exactions were

Compensation of Diplomatic Officers.

first made. I think that since the ratification of the treaty of the United States with Belgium, that is, since the 16th of April, 1859, the exaction in the ports of the United States of tonnage and similar taxes from Bremen steamers plying regularly, &c., has been contrary to the stipulation above recited of the treaty of December 20, 1827, with the Hanseatic Republics—contrary, therefore, to the supreme law of this nation; that the money so received was not, and is not, the money of the United States, and I know of no reason in law or morals why it should not be refunded to those from whom it has been illegally taken.

I am, very respectfully,

GEO. H. WILLIAMS.

Hon. B. H. BRISTOW,

Secretary of the Treasury.

COMPENSATION OF DIPLOMATIC OFFICERS.

Where a diplomatic officer, of a class named in the act of June 17, 1874, chap. 294, temporarily absented himself for a period of not over ten days: *Held* that the right to compensation, where the absence is not over ten days, is in no case affected by that act, and that such officer may, accordingly, be allowed compensation for the period of his temporary absence.

DEPARTMENT OF JUSTICE,

March 2, 1875.

SIR: I have had the honor to receive your letter of the 12th ultimo, directing my attention to the act of June 17, 1874, entitled "An act relating to ambassadors, consuls, and other officers," and requesting an opinion on a question that has arisen in your Department upon the following case: A diplomatic officer, one of a class named in the act just mentioned, has temporarily absented himself from his post for a period of not over ten days. The question is, whether, under the provisions of that act, he may be allowed compensation during the time of such temporary absence, it not being a case of sickness.

By the said act it is provided that none of the various diplomatic, consular, and other officers designated therein, "shall be absent from his post or the performance of his duties for a

Case of the Steamboat Joseph Pierce.

longer period than ten days at any one time, without the permission previously obtained of the President; and no compensation shall be allowed for the time of any such absence in any case except in cases of sickness."

I find that a similar provision, contained in the 19th section of the act of August 18, 1856, (11 Stat., 59,) in which precisely the same language is employed, was considered by Mr. Attorney-General Black, and the construction put thereon by him was to this effect, that where the absence exceeded ten days in duration, without sickness and without leave, the officer was subjected to the loss of his salary only for the period of the excess over ten days. "It is manifest," he observes, "that absence of a certain sort takes away the right of the officer to salary. But what sort of absence? Such absence as that previously described, namely, an absence of more than ten days without leave. An absence of less than ten days without permission, or of more than that time with leave, is not *such* absence as the law forbids." (9 Opin., 138.)

Agreeably to this view, the right to salary, where the officer was not absent longer than ten days, was unaffected by the law; and I see no reason to question its soundness.

The same construction, to my mind, applies with equal force to the provision of the act of 1874, now under consideration, and I am, accordingly, of the opinion that in the case presented by you the officer is entitled to compensation for the period of his temporary absence.

I am, sir, very respectfully, your obedient servant,
GEO. H. WILLIAMS.

Hon. HAMILTON FISH,
Secretary of State.

CASE OF THE STEAMBOAT JOSEPH PIERCE.

To bring a claim for the loss of a steamboat within section 3483 of the Revised Statutes, it must be shown, 1st, that the boat was in the military service, either by impressment or contract; 2d, that the loss occurred while the boat was actually employed in such service; 3d, that it was caused by an unavoidable accident, and not through any fault or negligence on the part of the owner; 4th, that the case is not one wherein the risk was agreed to be incurred by the owner.

Case of the Steamboat Joseph Pierce.

Where the question in such a claim is, whether the boat was or was not in the military service by contract, the distinction between a contract which imports the letting of the boat for hire, (*locatio rei*), and one importing merely the carriage of goods for hire, (*locatio operis mercium vehendarum*), is material; contracts of the former kind *only* being within the statute.

To make out an impressment binding upon the Government, it is essential that there be shown to have existed such an emergency as justified the officer in taking the property; but this, together with an actual taking or what is equivalent thereto, being satisfactorily established by the claimant, nothing more remains to be proven by him under that head.

An impressment of property is simply a *conclusion of fact*, to be deduced from other facts established by the evidence submitted; and hence it is not within the province of the Attorney-General to determine the question whether there was or was not an impressment in a particular case.

DEPARTMENT OF JUSTICE,
March 5, 1875.

SIR: Your communication of the 26th of December last submits for my consideration a question that has arisen upon the claim of Henry W. Taylor and Daniel Dwight for the value of the steamboat Joseph Pierce, which, you state, was "destroyed by the explosion of her boilers on the 31st of July, 1865, while employed as a common carrier, on the Mississippi River, and at the time of the disaster was plying in her capacity as a carrier between New Orleans and Vicksburg."

The question is as follows: "Under section 2 of the act of March 3, 1849, for the payment of horses, mules, oxen, &c., lost or destroyed, &c., while in the military service of the United States, (*vide* 9 Stat., 414,) was there an impressment of the property of the claimants in such a sense as to render the United States liable?"

For the facts of the case to which this question relates you refer me to a statement of the Second Comptroller accompanying your communication. As gathered from that statement, the facts are briefly these:

On the 30th of July, 1865, the officer in command of a regiment of United States soldiers stationed at Davis's Bend, on the Mississippi River, received orders to embark on the first boat for Vicksburg, with nine companies of his command and their camp and garrison equipage, &c. Next day, at 2 p.

Case of the Steamboat Joseph Pierce.

m., the Joseph Pierce, which, as above intimated, was then plying as a common carrier between New Orleans and Vicksburg, arrived at Banks's Landing, (same locality as Davis's Bend,) on her way to Vicksburg. The said officer thereupon addressed a written order to the master of the steamboat, in the following terms: "In compliance with instructions from headquarters western district of Mississippi, you will take on board and convey to Vicksburg, Mississippi, the Sixty-fourth United States Colored Troops, with equipage and transportation," &c.; and he also directed the equipage to be put on board and the embarkation of the troops to be at once commenced; but before the lading was completed the boilers burst, the boat took fire, and in a short time it became a total wreck.

It further appears from the same statement that, in answer to interrogatories propounded by the Second Comptroller, the person who was in command of the troops at the period referred to has since sworn as follows: "I hailed the steamer Joseph Pierce at Banks's Landing in the forenoon of July 31, 1865, and the instant I could do so went on board; found the captain half shaved in the barber-shop. He disputed my right to detain him and his boat. I offered him the alternative of assisting me, with good will, to embark my regiment, taking the order of General Osterhaus with my indorsement as voucher, or I would seize the boat, to comply with the order under which I was acting, leaving him to find the voucher for service in his own manner. I took this course not only as commanding officer of my regiment, but as senior officer at the station of Davis's Bend. The captain submitted to my determination to embark my regiment, and while walking over his boat stated that he had great difficulty in collecting pay for transportation of troops. Prior to her destruction the steamer had been under my control for at least half an hour."

The Comptroller furthermore finds, as facts, that "no contract or agreement was made for such use of claimants' steamboat, nor did Major Meatyard (the officer in command of the troops) issue a voucher therefor," and that "the destruction of the steamboat was occasioned by an unavoidable accident."

Case of the Steamboat Joseph Pierce.

I understand that the aforesaid claim for the value of the steamboat was made under the same enactment as that designated in the question submitted to me, viz, the 2d section of the act of March 3, 1849, which was in force when the claim was filed, but is not so now, it having been repealed on the adoption of the Revised Statutes, wherein, however, its provisions are substantially embodied, being found in section 3483 thereof. This section is in the following terms:

"Every person who sustains damage by the capture or destruction by an enemy, or by the abandonment or destruction by the order of the commanding general, the commanding officer, or quartermaster, of any horse, mule, ox, wagon, cart, sleigh, harness, steamboat or other vessel, railroad-engine or railroad-car, while such property is in the military service, either by impressment or contract; or who sustains damage by the death or abandonment and loss of any horse, mule, or ox, while in the service, in consequence of the failure on the part of the United States to furnish the same with sufficient forage, or whose horse, mule, ox, wagon, cart, boat, sleigh, harness, vessel, railroad-engine, or railroad-car, is lost or destroyed by unavoidable accident while such property is in the service, shall be allowed and paid the value thereof at the time when such property was taken into the service, except in cases where the risk to which the property would be exposed was agreed to be incurred by the owner: *Provided*, It appears that such loss, capture, abandonment, destruction, or death was without any fault or negligence on the part of the owner of the property, and while the property was actually employed in the service of the United States."

The question propounded will accordingly be considered as if it had referred to the section just quoted.

It will be seen that this section authorizes compensation to be allowed for the loss of certain kinds of private property, among which is included any "steamboat or other vessel," where such loss happened, in the manner specified, while the property was in the military service either by impressment or contract. Omitting so much of the section as does not appear to be material to the matter in hand, it reads in this wise: "Every person * * * whose * * * vessel is lost * * * by unavoidable accident while such prop-

Case of the Steamboat Joseph Pierce.

erty is in the service, [either by impressment or contract,] shall be allowed and paid the value thereof * * * except in cases where the risk to which the property would be exposed was agreed to be incurred by the owner: *Provided*, It appears that such loss * * * was without any fault or negligence on the part of the owner of the property, and while the property was actually employed in the service of the United States."

To bring a claim for the loss of the steamboat within this enactment, then, it must be shown: 1st. That the boat was in the military service, either by impressment or contract; 2d. That the loss occurred while the boat was actually employed in such service; 3d. That it was caused by an unavoidable accident, and not through any fault or negligence on the part of the owner; 4th. That the case is not one wherein the risk was agreed to be incurred by the owner.

The statute contemplates two modes whereby vessels may be taken into the military service, viz, by contract and by impressment.

In determining whether a vessel was taken into service by the first of these modes, it is important to keep in view the distinction between a contract which imports the letting of the boat for hire, (*locatio rei*), and one importing merely the carriage of goods for hire, (*locatio operis mercium vehendarum*.) Contracts of the former description have regard to the use and enjoyment of the thing hired, and involve a bailment thereof by the owner; and, inasmuch as the right to its possession and control is, from the nature of the agreement, in the hirer, it must be viewed as in his service during the continuance of the agreement. Contracts of the latter description have regard to the performance of work or labor simply, the transportation of property or persons, as the case may be; but do not involve any bailment of the means of transportation or conveyance by the owner, the use and enjoyment, possession and control thereof remaining with him exclusively. Of this description are contracts under which common carriers and private carriers (*i. e.*, carriers who are not common carriers) perform service, and they obviously do not come within the statute.

In the case under consideration there was no contract for

Case of the Steamboat Joseph Pierce.

letting the boat, or *locatio rei*, the Comptroller stating that no agreement was made for the use of the claimants' steamboat. So that the latter was clearly not in the military service by contract.

However, it appears that the boat was at the time plying as a common carrier of goods and passengers; and the transportation of the troops and their equipage may have been undertaken by the master in that capacity, or indeed as a private carrier, without any express contract being entered into. In such case, had the transportation been performed, an implied obligation would certainly have been incurred by the Government to pay a reasonable compensation therefor; but, other than this, no liability on the part of the Government could have arisen out of the matter. The undertaking of the master would come within that species of contract for hire mentioned above, known as *locatio operis mercium vehendarum*, and the situation or predicament of the boat, relatively to the military service, would have been unaffected thereby; for in such an undertaking, as I have already remarked, no bailment of the vessel takes place, but it remains, in a legal point of view, in the use and possession of the owner. Under circumstances of this kind, it is manifest the boat could not be regarded as in the military service within the meaning of the statute.

In determining whether a vessel was taken into the military service by the other mode adverted to, (impressment,) the subject more especially calls for the investigation of questions of fact. To make out an impressment binding upon the Government, it is essential, in the first place, that there be shown to have existed such an emergency as justified the officer in taking the property, (see *United States vs. Russell*, 13 Wall., 628.) This being satisfactorily established, and, moreover, the evidence satisfactorily showing an actual taking or what is equivalent thereto, nothing more remains to be proven under that head. Thus the finding of an impressment depends upon the finding of certain states of fact leading to that conclusion, which is itself only a conclusion of fact.

I come now to the point presented to me, namely, whether there was in the present case "an impressment of the prop-

Case of the Steamboat Joseph Pierce.

erty of the claimants in such a sense as to render the United States liable." This question, in effect, would seem to propose nothing more than the inquiry whether there was really any impressment of property in the case; for it is difficult to conceive of an impressment of property into the military service in more senses than one, though the methods of accomplishing the impressment may be many. Where all the elements of fact essential to constitute an impressment are present, there the case exhibits an impressment, which, in whatever light it is regarded, can have but one and the same sense; but if some or all of those elements are absent, then there is no impressment in the case, nor can the circumstances otherwise appearing therein be properly viewed as, in any sense, an impressment. And an impressment of property being, as I have above intimated, simply a conclusion of fact to be deduced from other facts established by the evidence, the determination of the question submitted would thus appear to be a matter not appropriate to, or at least not falling within the duty of, the Attorney-General.

Looking at the subject in this light, I might well ask to be relieved from its further consideration. But I will venture to make a remark or two with reference to the facts of the case as they are presented to me.

Aside from what is contained in the sworn statement of the officer who was in command of the regiment, there is nothing set forth in the papers but what, to my mind, is entirely consistent with an undertaking on the part of the master of the boat to transport the troops and their equipage simply as a common carrier—an undertaking that would have been quite natural, as the boat was then *en route* as a common carrier to the same point to which the troops were destined; the written order to the master constituting, in that aspect of the matter, merely a request to perform the service, and designed to enable him the better to obtain his compensation therefor by showing that the service was duly authorized.

According to the statement of the officer, however, the master was at first disinclined to undertake the transportation, and the former gave the latter the alternative of assisting with good will to embark the troops, taking an order as a voucher, or he (the officer) would seize the boat. It does not

Duties on Importations.

distinctly appear in that statement which, alternative the master accepted, whether he embarked the troops with good will and thus yielded his objections to performing the service, or whether he suffered the officer to seize the boat; though the latter says that prior to its destruction the boat had been "under his control" for at least half an hour. From this circumstance it might be inferred that the boat was under seizure when the disaster occurred, but such an inference does not necessarily arise, and the fact may have been otherwise.

With these few suggestions touching the facts of the case and their bearing upon the question whether there was an impressment of the claimant's property, I beg leave to return the papers without a formal expression of opinion upon that question, which, as I have already intimated, being one of fact only, it is not properly my duty to consider.

I have the honor to be, very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,
Secretary of War.

DUTIES ON IMPORTATIONS.

The duties imposed by the 1st section of the act of February 8, 1865, chap. 36, accrue on importations made on the day the act was approved. The phrase "from and after the date of the passage of this act" used in that section, and the phrases "from and after the passage," and "on and after the date of the passage," used in the 2d, 4th, 6th, and 8th sections of the same act, were employed simply as equivalents of each other, and are to be understood as identical in meaning and force.

DEPARTMENT OF JUSTICE,
March 10, 1875.

SIR: I have the honor to acknowledge the receipt of your letter of the 4th instant, inclosing a copy of an act entitled "An act to amend existing customs and internal-revenue laws, and for other purposes," approved February 8, 1875, and presenting for my consideration this question: "Whether, under the language employed in the beginning of the 1st section, the duties imposed by that section accrue on importa-

Duties on Importations.

tions made on the 8th day of February, the day the act was approved, or whether that section takes effect on the 9th day of February, and thereby excludes the 8th day of that month."

The language of the 1st section, referred to in the above question, is as follows: "That *from and after the date of the passage* of this act * * * the following rates of duty shall be exacted," &c.

In connection with this provision, my attention is directed to phraseology of like character used in other sections of the same act. Thus, in the 2d section it is declared "That *from and after the passage* of this act * * * there shall be levied," &c.; and in the 6th section the same words, "from and after the passage," &c., are found. In the 4th section it is provided, "That *on and after the date of the passage* of this act * * * there shall be levied," &c. The 8th section, which exempts certain articles from duty, employs the same phraseology as that contained in the 4th section, viz, "on and after the date of the passage," &c.

The phrase "from and after the passing" of an act, when used to indicate the time at which its provisions go into operation, received a judicial construction in the case of *Arnold vs. United States*, (9 Cranch, 104.) The question there was, whether a certain cargo, imported into the United States, came under the operation of the act of 1812, imposing double duties on importations "from and after the passing" of the act. The act was approved and signed by the President on the 1st of July, and the goods were imported on the same day; and the decision of that question turned on the point when the act took effect. The court held that the act took effect on the day of its passage; applying the general rule that, where the computation is to be made from an act done, the day on which the act is done is to be included.

This authority would be decisive as to the interpretation to be placed upon the words "from and after the passage," &c., used in the 2d and 6th sections of the act of 1875, if the time when the provisions of these sections take effect were at all in question; and in regard to the words employed in the 4th and 8th sections, viz, "on and after the date of the passage," &c., they certainly could give rise to no doubt as to when the provisions of the last-named sections become

District of Columbia 3.65 Bonds.

operative. Those two phrases, "from and after the passage" and "on and after the date of the passage," upon the points just adverted to, are to be understood as identical in meaning and force, notwithstanding their diversity in respect to the form of expression employed in each.

The phrase which appears in the 1st section, viz, "from and after the date of the passage," varies from each of the other phrases mentioned; and it must be admitted that, considered apart from the remainder of the statute, there would be ground for holding that the day of the date of the act is thereby excluded. But looking at the whole statute, and especially at those parts of it which, like the 1st section, impose duties, I do not think it was the intention of Congress to make any distinction as to the time when such parts should go into operation.

The most reasonable view seems to be that the phraseology used in the 1st section was not meant by that body to have any signification or effect different from that used in the other sections above designated, and that the various phrases quoted were employed simply as equivalents of each other.

I have, therefore, to say, in answer to the question submitted by you, that, in my opinion, the duties imposed by the 1st section of the act of 1875 accrue on importations made on the 8th of February, the day the act was approved.

I am, sir, very respectfully, your obedient servant,

GEO. H. WILLIAMS.

HON. B. H. BRISTOW,

Secretary of the Treasury.

DISTRICT OF COLUMBIA 3.65 BONDS.

The amendment of the 7th section of the act of June 20, 1874, chap. 337, made by the act of February 20, 1875, chap. 94, supplies by legislative authority, in the particular clause to which it relates, nothing more than what was previously necessary to be supplied by construction, in order to give the clause any meaning or effect whatever, consistent with its obvious purpose; it does not really introduce any modification of the former law, but merely renders the meaning thereof more plain and explicit.

Hence the pledge of the faith of the United States, with respect to the payment of the principal and interest of the District of Columbia 3.65 bonds, is not made any more complete thereby, but remains precisely as it was before.

District of Columbia 3.65 Bonds.

The word "guarantee" does not aptly describe the undertaking of the United States in relation to those bonds; though, *practically*, such undertaking, when regarded as a security, may be equivalent to an unqualified guarantee; inasmuch as the particular means and sources of revenue by and from which the United States promise to provide for the payment of said bonds, interest and principal, are unquestionably adequate to that end.

DEPARTMENT OF JUSTICE,

March 13, 1875.

SIR: You referred to me, on the 8th instant, at the solicitation of the Commissioners for the District of Columbia, a communication addressed to them by the sinking-fund commissioners of the District, wherein allusion is made to the District 3.65 bonds in connection with the recent act of February 20, 1875; and you also requested my opinion upon the question presented in that communication, namely, "as to whether the pledge of the faith of the United States for the payment of the principal and interest of these bonds may now be considered complete, and whether the sinking-fund commissioners would be justified in using the words 'principal and interest guaranteed by the United States,' over the signature of the officer of the United States Treasury by whom such bonds shall be registered, in lieu of printing the words of the various laws relating thereto upon the back of the bonds." I have the honor to submit the following in answer to your request:

The act of February 20, 1875, amends the 7th section of the act of June 20, 1874, which provides for the issue of the bonds mentioned, by inserting the words "do so" after the fortieth word following the first period in said section. This amendment supplies by legislative authority, in the particular clause to which it relates, nothing more than what was previously necessary to be supplied by construction in order to give the clause any meaning or effect whatever consistent with its obvious purpose. Viewed thus, the amendment does not really introduce any modification of the former law, but simply renders the meaning thereof more plain and explicit; and this, no doubt, was its sole object. Hence the pledge of the faith of the United States is not made any more "complete" thereby, but remains precisely as it was before, except that what was

District of Columbia 3.65 Bonds.

then left to be implied in the statute is now formally expressed therein.

I doubt whether the use of the words "principal and interest guaranteed by the United States," in the manner above suggested, would be justified by the terms of the law. The word "guarantee" has a technical signification when employed in connection with contracts and obligations—importing an engagement to be responsible for the payment of some debt or the performance of some duty, in case of the failure of a third party, who, in the first instance, is liable to such payment or performance. It is clear that, in this sense, the word would not aptly describe the undertaking of the United States, which is in the following language: "The faith of the United States is hereby pledged that the United States will, by proper proportional appropriations as contemplated in this act, and by causing to be levied upon the property within said District such taxes as will do so, provide the revenues necessary to pay the interest on said bonds as the same may become due and payable, and create a sinking-fund for the payment of the principal thereof at maturity." Here the Government of the United States itself undertakes to provide the revenue necessary to meet the interest as the same becomes due, and to create a sinking-fund for the payment of the principal at the maturity of the bonds, without regard to the failure of any third party.

Practically, however, the pledge given by the United States, considered in the light of a security, may be equivalent to an unqualified guarantee; since the particular means and sources of revenue by and from which the Government promises to provide for the payment of the interest and principal are unquestionably adequate for that purpose. But I think it advisable, in representing the undertaking of the Government, to conform as nearly as possible to the exact terms of the statute. If, then, for the sake of convenience, it is desirable to set forth, on the face or back of the bond, the substance of that undertaking instead of the "words of the various laws relating thereto," I would suggest the following in place of what is proposed by the sinking-fund commissioners: "By the acts of Congress of June 20, 1874, and February 20, 1875, the faith of the United States is pledged to pay the

Case of Paymaster Billings, of the Navy.

interest hereon as the same may become due and payable, and to provide for the payment of the principal hereof at maturity."

This form is sufficiently concise, and, in my judgment, describes the obligation of the Government with more accuracy than the form suggested by the commissioners.

I have the honor to be, with great respect, your obedient servant,

GEO. H. WILLIAMS.

The PRESIDENT.

CASE OF PAYMASTER BILLINGS, OF THE NAVY.

The provision of the 7th section of the act of July 15, 1870, chap. 295, declaring that thereafter "the increased pay of a promoted officer [of the Navy] shall commence from the date he is to take rank, as stated in his commission," applied to such advancement or promotion in rank, and such only, as entitled the officer advanced or promoted to an increase of pay over what he got at the time his advancement or promotion actually transpired; the words "increased pay," in that provision, being used relatively to the pay he *then* received.

Hence where B., a paymaster in the Navy, was on the 17th of February, 1871, advanced fifteen numbers in his own grade, under the act of January 24, 1865, chap. 19, and received a new commission by which he took rank as a paymaster from October 20, 1864; the commission held by him at the time of his advancement giving him rank as paymaster only from May 4, 1866, between which date and October 20, 1864, he had served and been paid as an assistant paymaster: *Held* that the case did not come within the above-mentioned provision, the advancement of B. not involving any increase of pay over what was received by him at the time it happened; and that, accordingly, a claim made by him under that provision for the difference between the pay of an assistant paymaster and the pay of a paymaster for the period between October 20, 1864, and May 4, 1866, is inadmissible.

DEPARTMENT OF JUSTICE,

March 18, 1875.

SIR: Your communication of the 3d ultimo, in regard to the case of Paymaster Luther C. Billings, of the Navy, presents for my consideration the question whether that officer is entitled to the difference of pay claimed by him, on the following state of facts:

Paymaster Billings was, on the 17th of February, 1871, ad-

Case of Paymaster Billings, of the Navy.

vanced fifteen numbers in his grade, under the provisions of the act of January 24, 1865, chap. 19, (13 Stat., 424;) receiving then a new commission, by the terms of which he was to rank as a paymaster from October 20, 1864. The commission which he held at the time of this advancement gave him rank as a paymaster from May 4, 1866. During the period intervening between these two dates he had served and received pay as an assistant paymaster; and he now claims the difference between the compensation of an assistant paymaster and that of a paymaster, for that period.

This claim is based on the provision of the 7th section of the act of July 15, 1870, chap. 295, (16 Stat., 333,) declaring that thereafter "the increased pay of a promoted officer shall commence from the date he is to take rank as stated in his commission;" which provision was in force when Paymaster Billings received his new commission as aforesaid, though it has since been repealed.

The provision just referred to was manifestly designed to modify the pre-existing general rule as to the commencement of the pay of promoted officers, where their promotion involved an increase of pay over what was received by them when it actually transpired. According to that rule, the pay of all such officers commenced from the date of the signature of an appointment to perform the duty, if one was given before the issue of a commission, or from the date of the commission if no appointment was previously given. (See Navy Regulations, ed. of 1865, par. 1162; also *ibid.*, ed. of 1870, par. 1508.)

The statute changed this by requiring the date at which the promoted officer was to take rank, as stated in his commission, to be the point for the commencement of his pay, instead of the date of his appointment or commission.

But it must be borne in mind that the subject-matter which the rule, as the same formerly stood, was designed to regulate was the time from which the pay of an officer, whose promotion carried with it an increase of compensation beyond what he previously received, should begin to run at the increased figure. Hence the case of an advancement in the same grade came not within the operation of the rule, because that involved no increase of pay. Now, the rule, as sub-

Commissioners of Freedman's Savings and Trust Co.

sequently modified, was intended to embrace the same subject-matter, and to have the same scope, and nothing more. It applied to such advancement or promotion in rank, and such only, as entitled the officer advanced or promoted to an increase of pay over what he got at the time his advancement or promotion actually transpired; for it is plain that the words "increased pay," in the statute, are used relatively to the pay he *then* received.

From this point of view, the conclusion seems unavoidable that the above-mentioned provision of the act of 1870 had no application to a case like the one under consideration; inasmuch as the advancement of the claimant, being confined to the same grade in which he already held a commission, conferred upon him no right to an increase of compensation over what he was in receipt of, by virtue of that commission, at the time when such advancement occurred. I am, accordingly, of the opinion that he is not entitled to the difference of pay claimed.

I have the honor to be, very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. GEO. M. ROBESON,
Secretary of the Navy.

COMMISSIONERS OF FREEDMAN'S SAVINGS AND TRUST CO.

Rights, duties, and responsibilities of the commissioners appointed under the 7th section of the act of June 20, 1874, chap. 349, to wind up the business of the Freedman's Savings and Trust Company, considered and commented on.

The commissioners thus appointed having become invested with the title to the property of said company and taken upon themselves the performance of their trust, it is not competent to either the board of trustees of said company or the Secretary of the Treasury to accept the resignations of the former, and relieve them from the duties and responsibilities which they have assumed.

DEPARTMENT OF JUSTICE,
March 20, 1875.

SIR: I have the honor to acknowledge the receipt of your letter of the 11th instant, inclosing a copy of a recent com-

Commissioners of Freedman's Savings and Trust Co.

munication addressed to you by Messrs. J. A. J. Oreswell, B. H. T. Leopold, and Robert Purvis, the commissioners in charge of the property and effects of the Freedman's Savings and Trust Company, and requesting my opinion upon the questions therein suggested by them.

For reasons set forth in their communication, which it is unnecessary to repeat here, the commissioners express a desire to be relieved from further responsibility on account of the trust reposed in them, and tender to you their resignations, provided their bond may be released from liability after their retirement, and new commissioners may be substituted in their places.

Reference is made by the commissioners to the 7th section of the act of June 20, 1874, under which they were appointed, and they suggest for my consideration the following questions: "Whether the power to appoint commissioners thereunder has or has not been exhausted; whether, upon resignation of their trust, they may be absolved from further responsibility, and their bond released; and whether vacancies occasioned by resignation may be filled by the selection and approval of new commissioners, and a new bond, binding in law, accepted from them, for the faithful discharge of their duties."

These questions all seem to resolve themselves into the inquiry, whether the present commissioners can retire and others be appointed in the manner proposed.

The Freedman's Savings and Trust Company was incorporated by the act of March 3, 1865, chap. 92. The management and direction of its business, principally that of banking, were thereby placed in the hands of a board of trustees, upon which was conferred power to fill vacancies therein occasioned by death, resignation, or otherwise, and to appoint officers, &c. That act was amended by the act of June 20, 1874, chap. 349, whereof the 7th section, to which the commissioners in their communication refer, reads as follows:

"SEC. 7. That whenever it shall be deemed advisable by the trustees of said corporation to close up its entire business, then they shall select three competent men, not connected with the previous management of the institution, and ap-

Commissioners of Freedman's Savings and Trust Co.

proved by the Secretary of the Treasury, to be known and styled commissioners, whose duty it shall be to take charge of all the property and effects of said Freedman's Savings and Trust Company, close up the principal and subordinate branches, collect from the branches all the deposits they have on hand, and proceed to collect all sums due said company, and dispose of all the property owned by said company, as speedily as the interests of the corporation require, and to distribute the proceeds among the creditors pro rata, according to their respective amounts; they shall make a pro-rata dividend whenever they have funds enough to pay twenty per centum of the claims of depositors. Said commissioners, before they proceed to act, shall execute a joint bond to the United States, with good sureties, in the penal sum of one hundred thousand dollars, conditioned for the faithful discharge of their duties as commissioners aforesaid, and shall take an oath to faithfully and honestly perform their duties as such, which bond shall be executed in presence of the Secretary of the Treasury, be approved by him and by him safely kept; and whenever said trustees shall file with the Secretary of the Treasury a certified copy of the order appointing said commissioners, and they shall have executed the bonds and taken the oath aforesaid, then said commissioners shall be invested with the legal title to all of said property of said company for the purposes of this act, and shall have full power and authority to sell the same, and make deeds of conveyance to any and all of the real estate sold by them to the purchasers. Said commissioners may employ such agents as are necessary to assist them in closing up said company, and pay them a reasonable compensation for their services out of the funds of said company; and the said commissioners shall retain out of said funds a reasonable compensation for their trouble, to be fixed by the Secretary of the Treasury and the Comptroller of the Currency, and not exceeding three thousand dollars each per annum. Said commissioners shall deposit all sums collected by them in the Treasury of the United States until they make a pro-rata distribution of the same."

This section embraces all the provision made by Congress for winding up the general business and affairs of the com-

Commissioners of Freedman's Savings and Trust Co.

pany. It authorizes the trustees of the corporation, whenever they deem it advisable, to close up its entire business, to appoint three commissioners for that purpose, with the approval of the Secretary of the Treasury, who are required to give a joint bond, to be approved in like manner, conditioned for the faithful discharge of their duties, and also to take an oath to faithfully perform the same; and upon their giving the bond and taking the oath required, and upon a certified copy of their appointment being filed by the trustees with the Secretary, *the legal title to all the property and effects of the company* becomes, by force of the statute, vested in the commissioners, subject to the trusts devolved upon them in connection therewith. Their duty is then to take charge of such property and effects, close up the principal and subordinate branches of the company, collect from the branches all the deposits on hand, and proceed to collect all sums due the company, dispose of all its property as speedily as the interests of the corporation require, and to distribute the proceeds among the creditors *pro rata*, &c.

I think it proper to observe that, after the commissioners have been appointed and have qualified as aforesaid, and the legal title to the property of the company has become vested in them, the right and authority of the *trustees of the corporation* touching the care, management, control, or disposition of such property, immediately cease. They are clothed with no supervisory powers whatever over the action of the commissioners; but on the contrary, the latter, in the administration of the trust committed to them, are left entirely to their own discretion, subject to the law under which they act.

The situation of the commissioners, when they once become invested with the title to the property and take upon themselves the performance of the duties mentioned, is very similar to that of a trustee named in a deed who accepts the trust created thereby. The latter, having once entered upon the management of the trust, must continue to act until he is discharged in one of three ways: first, in the manner pointed out in the instrument creating the trust, if it contains any provisions on the subject; second, by the agreement and concurrence of all the parties interested in the

Commissioners of Freedman's Savings and Trust Co.

trust, if they are competent to consent to the arrangement; and, third, by appropriate proceedings had before a court having jurisdiction over the trust. And the reason is that the trust-property cannot otherwise be divested out of the trustee so as to relieve him from responsibility.

Now, on reference to the section above quoted, it will be seen that no provision is there made for the discharge or removal of the commissioners and the appointment of others in their places. Neither the Secretary of the Treasury nor the board of trustees of the corporation appears to be clothed with any power looking to that end; and in the absence of such power, it would not be competent to either, I think, to accept the resignations of the commissioners and relieve them from the duties and responsibilities which they have assumed. Their resignation, if so accepted, would therefore amount to no more than a mere abandonment of the trust by them, which plainly could not have the effect of revesting the trust-property in the corporation. Nor would the appointment of new commissioners by the board, with the approval of the Secretary, operate to transfer the trust-property to the new appointees and subject it to their control and disposition; and on the other hand, the old commissioners could not, as it would seem, convey to them without committing a breach of trust, or at least they could not thus relieve themselves from future liability with respect thereto, unless the transactions were sanctioned by the decree of a court having jurisdiction over the trust, or by the consent of all the parties interested in the effects of the corporation.

My conclusion, therefore, is that the present commissioners cannot relinquish their trust, nor can others be appointed in their places, in the manner proposed in their communication to you; and, accordingly, to each of their several questions I make a negative answer.

I am, sir, very respectfully, your obedient servant,
GEO. H. WILLIAMS.

Hon. B. H. BRISTOW,
Secretary of the Treasury.

District of Columbia Bonds.

DISTRICT OF COLUMBIA BONDS.

The bonds of the District of Columbia, which the commissioners of the sinking-fund of the District were authorized to issue by an act of the District legislative assembly, passed June 20, 1872, are not affected by the provisions of the 16th section of the act of March 3, 1875, chap. 162, requiring the destruction by burning of all bonds, sewer-certificates, and other obligations of the cities of Washington and Georgetown and of the District of Columbia, "paid or redeemed," &c.; there not having been such a redemption of the first-mentioned bonds as to require them to be destroyed.

Those bonds may be disposed of by the commissioners of the sinking-fund agreeably to the provisions of the aforesaid act of the District legislative assembly, subject to the restriction respecting the sale thereof which is imposed by the 10th section of the act of June 20, 1874, chap. 337.

DEPARTMENT OF JUSTICE,

March 29, 1875.

SIR: I have duly considered a communication from the commissioners of the sinking-fund of the District of Columbia, bearing date March 17, 1875, referred by you to me; and to your request for my opinion upon the question therein stated I have the honor to submit the following:

The commissioners state that by the act of the District assembly of June 20, 1872, (pp. 51, 52 of the Acts of the Assembly of that year,) they were authorized to issue bonds, and, in connection with the governor of the District, to negotiate the sale of them, and with the proceeds to pay certain liabilities of the city of Washington, "including the seven-and-three-tenths certificates of indebtedness issued under act of Congress and ordinances of said city." These certificates would mature July 30, 1873, and November 20, 1875. When the first class of them was about coming due, the bonds could not be sold except at great sacrifice. The commissioners did not sell them, but borrowed money to meet the maturing certificates, using the bonds as security for the loans. These loans have been paid—not with proceeds of the sale of the bonds, nor with moneys raised by the taxation authorized by section 2d of the assembly's act of 1872, for the special purpose of meeting the interest on this class of bonds, and creating a sinking-fund for their payment, but with moneys

District of Columbia Bonds.

taken from other funds provided for other purposes. And the bonds in question are now held by the commissioners as means wherewith to restore those "funds," as well as to meet the seven-and-three-tenths certificates which mature November 20, 1875. In full view of this action of the commissioners and this condition of the bonds, Congress, by the 10th section of the act of June 20, 1874, entitled "An act for the government of the District of Columbia," ratified and approved the assembly's act above cited, prohibiting, however, the sale of any of the bonds authorized by that act at prices less than par. Congress thus confirmed the authority of the commissioners to negotiate the sale of all the bonds in question "remaining unsold." And this power now rests with the commissioners unless it is impliedly revoked and the bonds taken out of their hands by the 16th section of the act "for the support of the government of the District," approved March 3, 1875.

That section provides for the destruction, by burning, of all bonds, sewer-certificates, and other obligations of every kind whatsoever, of the city Washington, the city of Georgetown, and of the District of Columbia, which bonds, obligations, &c., have heretofore been "paid or redeemed" by the Commissioners of the District of Columbia, or by the commissioners of the sinking-fund. This is a general law decreeing the complete destruction of all forms of *evidence* of indebtedness issued by the municipal bodies named, where such indebtedness has been either extinguished or represented by new forms of obligations. The purpose for which these instruments were issued having been accomplished, it is the intent of the law that they shall never be re-issued or used for any object whatever.

The commissioners of the sinking-fund state that they have on hand a large amount of these defunct instruments, bonds, certificates, and obligations, that have been *paid* in money, also a large amount of sewer and other certificates that have been *redeemed* by being received as payment of special taxes. Upon all these the recent law operates and enjoins their destruction.

But the bonds under consideration, if ever redeemed at all, in any proper sense of the term, were redeemed prior to the

District of Columbia Bonds.

passage of the act of June 20, 1874; and Congress, in full view of the action of the commissioners, specially points to the bonds, and gives to the commissioners authority to sell all that "remain unsold." This law is not repealed nor the authority given by it revoked by the 16th section of the act of March 3, 1875. It is well settled that a later statute which is general and affirmative does not abrogate a former which is particular; and the law will not allow of the repeal or alteration of a particular statute by the construction of general words in a later act, when the words may have their proper operation without it. (Dwarris on Statutes, 532.)

I hold, therefore, that the bonds in question are not affected by the act of March 3, 1875, even if they can be said to have been once redeemed. In that case the law of 1874 gave them new life, and they were as if they had never been used at all.

But have the bonds in question ever been "paid or redeemed?" It is needless to say they have not been paid, for they have not been negotiated or sold. The title to them has not been conveyed. No parties have had relations to the bonds so that they could receive payment of them. They were, however, pledged as security for money borrowed to meet certain liabilities, which were intended to be paid by the proceeds of their sale. They then passed, I presume temporarily, from the custody of the commissioners; but were returned, the loans for which they were security having been paid. Now, if any portion of the money which paid these loans was raised by the taxation provided for in section 2 of the assembly's act of June 2, 1872, the express purpose of which was to create a sinking-fund for the retirement of these bonds, to that extent they have been redeemed. But the money to pay the loans was not so obtained. The commissioners again borrowed it from funds devoted to other purposes. The bonds then, *pro tanto*, represent those funds. They constitute, as the commissioners state, an important part of the sinking-fund. The transaction was only a shifting of loans, and the bonds remain pledged as security for the new loan. They have not, therefore, been redeemed. They have not as yet paid or replaced the special indebtedness of the city of Washington for the retirement of which they were issued. In short, the purpose for which they were authorized

 Jurisdiction over National Cemeteries.

has not been accomplished. Again, as these bonds have not been sold they have produced no money; the commissioners have received no value for them.

Evidently it was not the design of Congress, in passing the act of March 3, 1875, to strip the commissioners of the sinking-fund of the means lawfully in their hands to meet the liabilities of the municipal bodies whose financial affairs they are called to administer; but the purpose of the act was to take away the possibility of the resuscitation or use for any purpose whatever of all those written evidences of the indebtedness of the said municipal bodies, which have accomplished the end for which they were issued. Such is not the condition of the bonds in question.

To the inquiry of the commissioners of the sinking-fund of the District of Columbia, whether there has been "such a redemption of the said bonds as to require them to be destroyed," I make a negative answer; and for the reasons above given I am of opinion that the bonds are in the hands of the commissioners to be dealt with as required by the act of the District assembly which authorized their issue, and the act of Congress of June 20, 1874.

I am, sir, very respectfully, your obedient servant,
GEO. H. WILLIAMS.

The PRESIDENT.

 JURISDICTION OVER NATIONAL CEMETERIES.

The United States have over lands within a State held for national cemeteries or other public purposes, which were acquired by the former without the consent of the State, or over which the latter has not ceded its jurisdiction, only such jurisdiction as they have over other parts of the State wherein they possess no proprietary interests.

The mere ownership of the land does not put the United States in a different position, as regards the matter of jurisdiction over it, than they occupied previous to its acquisition; nor is the situation of the State, with reference to the same matter, in any degree altered thereby.

Strictly speaking, therefore, where the United States own land situated within the limits of a State, but over which they have not acquired jurisdiction from the State, they cannot be said to have any *local* jurisdiction over such land.

Jurisdiction over National Cemeteries.

DEPARTMENT OF JUSTICE,

April 2, 1875.

SIR: In your communication to me of the 8th ultimo, after adverting to the recent failure of a bill before the legislature of Missouri which provided for a cession to the United States of jurisdiction over certain lands in that State acquired and used by the former for the purpose of national cemeteries, you refer to an opinion given by Mr. Attorney-General Hoar, (13 Opin., 131,) in which he held that Congress cannot by its own act alone, and without the consent of the State, assert or exercise exclusive jurisdiction over lands acquired for the aforesaid purpose within the territorial limits of a State; and you remark that exactly what jurisdiction the United States possesses in cases where such consent is withheld is not stated by him. You then submit for my consideration the following question: "What jurisdiction over lands held for national cemeteries have the United States where the purchases have been made or the lands appropriated without the consent of the State legislatures?"

The answer I make to the above question is, that the United States have over lands thus held only such jurisdiction as they have over other parts of the State wherein they possess no proprietary interests; and that jurisdiction may, in general terms, be described as limited to those subjects which the Constitution has withdrawn from the jurisdiction of the State, or at least placed under the control of the National Government, and to which the legislative power of the latter extends.

The mere ownership of the land, under the circumstances mentioned, does not put the United States in a different position, as regards the matter of jurisdiction over it, than they occupied previous to its acquisition; nor is the situation of the State, with respect to the same matter, in any degree altered thereby. Hence, so long as the State retains its jurisdiction over the premises, Congress cannot pass laws for the punishment of crimes committed thereon, such as murder, manslaughter, larceny, maiming, assault, &c., since in that case these subjects do not fall within the legislative power granted by the Constitution to the General Government, but

Refunding Customs-Duties.

appertain exclusively to that reserved to the States. It is only after the State has parted with its jurisdiction, which may be either by a formal cession thereof to the United States, or simply by assenting to the acquisition of the land by the latter, that Congress becomes invested with authority thus to legislate. Accordingly, where that body has heretofore enacted laws punishing those crimes, their operation (excepting such as relate to crimes committed on the high seas) has been expressly limited to places or districts of country under the jurisdiction of the United States, (see Revised Statutes, sections 5339, 5341, 5348, 5356, 5385;) the power to enact such laws, so far as they apply to places or districts within the territorial limits of a State, being derived from that provision of the Constitution which vests in Congress authority to exercise "exclusive legislation, in all cases whatsoever," over "all places purchased by the consent of the legislatures of the States in which the same shall be situated," &c.

Strictly speaking, where the United States own lands situated within the limits of a State, but over which they have not acquired jurisdiction from the State, they cannot be said to have any *local* jurisdiction over the land whatever.

I have the honor to be, very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,
Secretary of War.

REFUNDING CUSTOMS-DUTIES.

The 1st section of the act of March 3, 1875, chap. 136, (save as to what is excepted under the *provisoes* therein,) leaves no power in the Secretary of the Treasury to refund any moneys collected as duties on imports in accordance with any decision, ruling, or direction made or given by that officer prior to the passage of that act, unless such decision, ruling, or direction is modified or overruled as therein indicated.

Nor can moneys collected as duties on imports in accordance with any decision, ruling, or direction of the Secretary of the Treasury, made on or after the date of that act, be refunded or repaid, except as provided for in said 1st section.

Under the 2d section of the same act, a decision *favorable* to the United States, which was unreversed and in force at the date of the act, must

Refunding Customs-Duties.

stand and be recognized by the Secretary of the Treasury as the rule to be followed upon the question involved therein, until it is reversed or modified as provided in said 2d section. But any decision, ruling, or direction which is *not favorable* to the United States, made by any Secretary of the Treasury prior to the date of the act, may be overruled by the present or any future Secretary of the Treasury, if in his judgment it is not a correct exposition of the law.

DEPARTMENT OF JUSTICE,

April 7, 1875.

SIR: I have considered the communication of Hon. Charles F. Conant, Acting Secretary, bearing date March 19, 1875, and the memorandum accompanying the same, in which suggestions are made and questions propounded relative to the construction of the act of Congress, approved March 3, 1875, entitled "An act restricting the refunding of customs-duties and prescribing certain regulations of the Treasury Department."

Section 1 of said act provides as follows: "That no moneys collected as duties on imports in accordance with any decision, ruling, or direction previously made or given by the Secretary of the Treasury, shall, except as hereinafter provided, be refunded or repaid, unless in accordance with the judgment of a circuit or district court of the United States, giving construction to the law, and from which the Attorney-General shall certify that no appeal or writ of error will be taken by the United States; or unless in pursuance of a special appropriation for the particular refund or repayment to be made: *Provided*, That whenever the Secretary shall be of opinion that such duties have been assessed and collected under an erroneous view of the facts in the case, he may authorize a re-examination and reliquidation in such case, and make such refund in accordance with existing laws as the facts so ascertained shall, in his opinion, justify; but no such reliquidation shall be allowed unless protest and appeal shall have been made as required by law: *Provided further*, That the restrictive provisions of this act shall not apply to such personal and household effects and other articles, nor merchandise, as are by law exempt from duty: *And provided also*, That this act shall not affect the refund of excess of deposits based on estimated duties, nor prevent the correction of

Refunding Customs-Duties.

errors in liquidation, whether for or against the Government, arising solely upon errors of fact discovered within one year from the date of payment, and, when in favor of the Government, brought to the notice of the collector within ten days from the date of discovery."

Inquiry is made as to this provision of law as follows:

1. "How, and to what extent, does said act affect the refund of duties collected *prior* to March 3, 1875?"

2. "How, and to what extent, does said act affect the refund of duties collected *on or after* March 3, 1875?"

Independent of the exceptions contained in said section, my opinion is that since the passage of this act the Secretary of the Treasury has no power to refund any moneys collected as duties on imports in accordance with any decision, ruling, or direction made or given by the Secretary of the Treasury prior to the passage thereof, unless said decision, ruling, or direction is modified or overruled as therein specified.

I am also of the opinion that any moneys collected as duties on imports in accordance with any decision, ruling, or direction of the Secretary of the Treasury made on or since the date of said act cannot be refunded or repaid except as provided for in said section.

Section 2 of said act is as follows: "That no ruling or decision once made by the Secretary of the Treasury, giving construction to any law imposing customs-duties, shall be reversed or modified adversely to the United States, by the same or a succeeding Secretary, except in concurrence with an opinion of the Attorney-General recommending the same, or a judicial decision of a circuit or district court of the United States conflicting with such ruling or decision, and from which the Attorney-General shall certify that no appeal or writ of error will be taken by the United States: *Provided*, That the Secretary of the Treasury may, in his discretion, decline to acquiesce in the judgment, decision, or ruling of an inferior court upon any question affecting the interests of the United States, when, in his opinion, such interests require a final adjudication of such question by the court of last resort."

I am of the opinion that, under this section, whether there have been conflicting decisions or not prior to the passage of the act in question touching the construction of any law im-

Temporary Appointments in the Army.

posing customs-duties, if there was a decision unreversed and in force at the time said act was passed favorable to the United States, such decision must stand and be recognized by the Secretary of the Treasury as the rule to be followed upon the question therein involved until it is reversed or modified as provided in said section. Any decision, rulings, or directions made by any Secretary of the Treasury prior to the passage of said act adversely to the United States may be overruled by the present or any subsequent Secretary of the Treasury, if, in his judgment, they are not correct expositions of the law.

Reference is made by the Acting Secretary to sections 2984, 3012½, 3013, 3689, 2652, and 989 of the Revised Statutes, but I do not see that they particularly concern the construction of the act in question, and it is not necessary or desirable that I should give any abstract views as to any other meaning or effect which they may have.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. B. H. BRISTOW,
Secretary of the Treasury.

TEMPORARY APPOINTMENTS IN THE ARMY.

Where, under the operation of the act of March 2, 1875, chap. 118, and the joint resolution of March 3, 1875, [No. 7,] two vacancies existed in the office of paymaster in the Army, with the rank of major, and nominations therefor were sent to the Senate by the President, but which that body failed to confirm before adjourning: *Held* that it is competent to the President to fill the two vacancies, during the recess of the Senate, by temporary appointments, and that he is not subject to any restrictions as to the persons whom he may thus appoint.

The construction put upon the clause in the Constitution giving the President power "to fill up all vacancies that may happen during the recess of the Senate by granting commissions which shall expire at the end of their next session," by former Attorneys-General, namely, that it confers upon him full power to fill vacancies in the recess of the Senate *irrespective of the time when such vacancies first occurred*, considered now to be the settled interpretation of that clause with the Department of Justice.

Temporary Appointments in the Army.

DEPARTMENT OF JUSTICE,

April 24, 1875.

SIR: I have the honor to acknowledge the receipt of your letter of the 6th instant, touching certain vacancies that now exist in the Pay Department of the Army, in which you state that—

“By the act of July 28, 1866, the number of paymasters was limited to sixty, and the act of March 3, 1869, prohibited new appointments and promotions in the Pay Department. The act of March 2, 1875, established the number of paymasters at fifty, and the act of March 3, 1875, authorized the appointment of such additional number of paymasters, with the rank of major, as will make the total number of paymasters, with the rank of major, fifty, and no more.

“Upon the passage of the acts of March 2 and 3, the President submitted to the last special session of the Senate the names of certain persons for confirmation as paymasters, with the rank of major. The Senate failed to confirm two of the nominations, and there are now two vacancies in the Pay Department.”

And in connection with the foregoing statement of facts, you submit for my consideration the following questions:

“Can the two vacancies now existing in the Pay Department, in the grade of paymaster, with the rank of major, be now filled by the President by temporary appointments; and, if you should decide affirmatively, whether the President is restricted as to the persons who may be appointed? Can he appoint the persons already nominated to the Senate, and not confirmed by that body, or must those names be now excluded from consideration?”

The case presented, relating as it does to the filling of offices in the military service, is not within the operation of what are known as the tenure-of-office laws of 1867 and 1869, the provisions whereof are in substance re-enacted in sections 1767 and 1768, *et seq.*, of the Revised Statutes, those laws applying exclusively to officers in the civil service; and there are no other statutes which in any way affect it. So that the question whether the two vacancies referred to may now be filled by the President, by temporary appointments, arises immediately and directly under the clause of the Constitution

Postal Convention with France.

which gives him power "to fill up all vacancies that may happen during the recess of the Senate by granting commissions which shall expire at the end of their next session."

That clause has been frequently considered by my learned predecessors in office, when passing upon similar questions submitted to them, and the results of their deliberations may be summed up thus: that it confers upon the President full power to fill vacancies in the recess of the Senate, *irrespective of the time when such vacancies first occurred*. (See the opinions of Mr. Evarts of August 17, 1868, 12 Opin., 449, 455; and the opinion of Mr. Stanbery of August 30, 1866, 12 Opin., 32, wherein the earlier opinions on the subject are cited.) I shall not undertake to review here the grounds on which that construction of the clause is placed, but shall hold that, so far as this Department is concerned, the question is settled.

I accordingly answer, that the two vacancies existing in the grade of paymaster, with the rank of major, can now be filled by the President by temporary appointments.

Touching the other questions submitted, namely, as to whether there are any restrictions on the President in regard to the persons who may be thus appointed, and whether he is at liberty to appoint those whom the Senate failed to confirm: to the former I answer, that I know of no such restrictions upon his power of appointment.

I am, sir, very respectfully, your obedient servant,
GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,
Secretary of War.

POSTAL CONVENTION WITH FRANCE.

The words "United States mail-packets," as used in the postal convention between the United States and France of March 2, 1857, mean such steamships or vessels, sailing on regularly-appointed days, as are engaged by the United States to carry the mail; they denote the *employment* of the steamship or vessel, not its *nationality*.

Hence the steamships of the Hamburg and American Packet Company, which were employed by the Post-Office Department to carry the mail between the United States and France, either directly or by way of Great Britain, were "United States mail-packets" within the meaning of those words as used in the said postal convention, and their employment for that purpose was consistent with the terms of that convention.

Postal Convention with France.

DEPARTMENT OF JUSTICE,

April 29, 1875.

SIR: I have the honor to acknowledge the receipt of your communication of March 26, 1875, in which you state that a controversy has arisen between the Post-Office Department of the United States and the administration of posts of France as to the meaning of the term "*United States mail-packets*" as used in the postal convention between the United States and France of March 2, 1857. Together with your communication I received also copies of the correspondence and of other documents relating to the subject. The text of the convention is to be found in 16 Stat., 871.

It is claimed by the French director-general of posts that the words above quoted from the convention mean steamships or vessels owned, in whole or in part, by citizens of the United States and sailing under the United States flag; while the Post-Office Department of the United States contends that those words indicate vessels employed by that Department to carry the mails of the United States between this country and France, without regard to the nationality of such vessels.

The precise question upon which you desire an expression of opinion from me is this: Were the steamships of the Hamburg and American Packet Company, which in the year 1869 were employed by the United States Post-Office Department to transport postal matter intended for France, either via England or directly to a port of France, "*United States mail-packets*" within the meaning of those words as used in the convention?

The words "*United States mail*" have long been used as a prefix to distinguish the conveyance, of whatever kind, which the United States employs to carry the mails, whether such conveyance be steamship, boat, coach, or railway-car. These are seldom, if ever, the property of the United States. They take the designation simply and only because of their relation by contract to the postal department of the Government. The words "*United States mail*" do not indicate that the United States, or the citizens of the United States, have any property-interest in these means of conveyance, but only in

Postal Convention with France.

the mails which they carry. They do not show the nationality of the ships, but of the mails. This common use of the phrase was doubtless in the minds of the negotiators of the convention, and it is reasonable to conclude that in this sense they intended it. The term "United States mail-packets," then, as used in the convention, signifies steamships or vessels, sailing on regularly-appointed days, which the United States employ to carry the mails.

The Post-Office Department of the United States was, however, restricted as to the nationality of the vessels it might contract with, by provisions in the first and second articles of the convention. In the first article, which prescribes what vessels shall be used to carry on the postal intercourse between France and the United States, British packets and steam-vessels *only* are *designated* by their nationality. The reason is apparent, for by the second article France was to pay all the expenses of transportation by means of British ships, thus precluding the use by the United States of English vessels, but, as to all other nationalities, leaving the field open for the United States to select vessels, and make of them "United States mail-packets." The purpose of the convention in this regard was to provide that France should bear the expense and enjoy the profit of all ocean-transportation of the mails between that country and the United States by means of British vessels, and all other vessels except such as were employed and paid by the United States, and these might be of any nationality except that of Great Britain.

If this be not the real meaning of the first and second articles, but, on the contrary, the construction insisted on by the French director-general of posts is correct, viz, that only vessels having a United States nationality can be "United States mail-packets," there was no need to set apart and distinguish by their nationality those belonging to Great Britain. It would have been necessary only to provide that the United States Post-Office should pay the expenses of the transportation of the mails by means of United States packets, (not United States *mail*-packets,) and the expense of transportation by all other vessels should be borne by France. The result of such an agreement would have been that France, under article seventh of the convention, would reap the profit

Postal Convention with France.

of all ocean-postage except that earned by means of United States vessels employed by the United States, and this nation, in order to participate at all in these profits, must see to it that regular lines of steamships, owned in the United States, were established and kept plying between this country and the ports of England or France, while the latter country was hampered by no such restrictions. The United States must employ United States ships or none, but France had all the world before her where to choose. Or if the Post-Office Department of the United States should, as in the case made by these papers, employ ships of the Hamburg line, the administration of posts of France would permit the former to pay the expense, but take to its own credit the ocean-postage. It is quite clear that in such a contract there is no reciprocity. It cannot be that the high contracting parties intended to make an arrangement so one-sided and inequitable.

But, finally, the conduct of the postal administration of France for eleven years subsequent to the date of the convention shows that the French understanding of the phrase in question did not differ from that which prevailed at the Post-Office Department of the United States. The correspondence before me shows that during this period the Bremen and Hamburg ships were, without objection on the part of France, employed by the United States in carrying from this country the mails for France, and that the Post-Office Department of the United States received the credit provided for in the convention, as for service done at the expense of the United States. The schedule of the United States mail-steamship service was furnished to the French director-general at his request, and in this schedule these foreign ships were called "United States mail-packets," as those of the New York and Havre line were. (Correspondence, pp. 135, 136, 137.)

True, the Bremen and Hamburg ships, during this period, deposited the mails for France at English ports; but where, according to the second article of the convention, the *transportation* was to be at the *expense* of the United States, whether by way of Great Britain or direct to France, it was to be effected by *United States mail-packets*. An admission, therefore, that the United States might employ the Bremen and Hamburg ships in the transportation terminating at

Nez Percé Reservation—Claim of W. G. Langford.

British ports, was an admission that the same lines might be so employed in the transportation terminating in France. The French director-general of posts, in his letter of June 24, 1869, (p. 70 of the correspondence,) endeavors to break the force of this admission by bringing into the case the postal arrangements of the United States with England and the North German Confederation. I fail to see the pertinency of these references. The rights and obligations of the parties to the convention of March 2, 1857, could not be abridged, enlarged, or altered by any agreements of either with other powers.

By the considerations above set forth, I am led to the conclusion that the steamships of the Hamburg and American Packet Company were rightfully employed by the Post-Office Department of the United States to transport the mails between this country and France, either directly or by way of Great Britain, and that by reason of such employment they were United States mail-packets within the meaning of those words as used in the convention of March 2, 1857.

I am, very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. MARSHALL JEWELL,

Postmaster-General.

NEZ PERCÉ RESERVATION—CLAIM OF W. G. LANGFORD.

The title of the American Board of Commissioners for Foreign Missions to the missionary station within the limits of the Nez Percé Indian reservation, derived under the acts of August 14, 1848, chap. 177, and March 2, 1853, chap. 90, (assuming that a title passed to said board by virtue of those acts,) was then, and has ever since continued to be, subject to the Indian right of occupancy in the Nez Percé tribe of Indians; and until this Indian right is extinguished, the present holder of that title has no right, merely by virtue of such title, to enter upon and take possession of the premises.

L., who claimed title to the tract of land included by said station, as assignee of said board, recovered judgment by default in the territorial court in an action to recover possession of the premises brought against an Indian agent occupying the same, and obtained actual possession thereof under a writ issued upon said judgment: *Held* that the judgment determined nothing adverse to the Indian right; that the writ founded on such judgment was ineffectual to give L. legal possession.

Nez Percé Reservation—Claim of W. G. Langford.

sion of land to which the Indian right still adheres; and that in entering upon the reservation thereunder he was simply an intruder, and may be summarily removed therefrom in the mode provided by section 2118 of the Revised Statutes.

DEPARTMENT OF JUSTICE,

May 3, 1875.

SIR: Your communication of the 4th of January last, touching the claim of William G. Langford to 640 acres of land within the Nez Percé Indian reservation, in Idaho Territory, refers me, for a history of the claim and the proceedings in connection therewith, to the annual report of the Commissioner of Indian Affairs for the year 1874, from which I extract the following statement:

"Langford makes this claim as assignee of the American Board of Commissioners for Foreign Missions, a religious corporation established under the laws of the State of Massachusetts, and having its principal office in Boston.

"The Nez Percé reservation is a tract of land set apart for the Nez Percé Indians by the provisions of the treaty of June 9, 1863, (14 Stat., 647,) from the large tract previously claimed by them, and which, by treaty of June 11, 1855, (12 Stat., 957,) was reserved for them from a still larger tract, the remainder of which they ceded at that time to the United States. This reservation, as established by the treaty of 1863, is recognized as belonging to these Indians, and is guaranteed to them both by the treaties of 1855 and 1863, and the existence of 'Indian title' thereto, running back to the first knowledge of the country, is as clear in this case as it can be in any. The missionary board above mentioned sent missionaries to this reserve in 1836, who settled upon the land in question. There is evidence of a continued residence and cultivation of the soil, erection of a mill, school-house, and other buildings, down to 1847, when, on account of an Indian outbreak, the place was abandoned.

"Over six months after this station had been abandoned, namely, August 14, 1848, Congress passed an act providing for a territorial government in Oregon, (9 Stat., 323,) in the 1st section of which is the following language: '*And provided also*, That the title to the land, not exceeding 640 acres, now occupied as missionary stations among the Indian tribes

Nez Percé Reservation—Claim of W. G. Langford.

in said Territory, together with the improvements thereon, be confirmed and established in the several religious societies to which said missionary stations respectively belong.'

"The tract of land in question was within the limits of Washington Territory when established. The 1st section of the act of Congress of March 2, 1853, establishing the territorial government of Washington, (10 Stat., 172,) contains the following provision: '*Provided further*, That the title to the land, not exceeding 640 acres, now occupied as missionary stations among the Indian tribes in said Territory, or that may have been so occupied as missionary stations prior to the passage of the act establishing the territorial government of Oregon, together with the improvements thereon, be, and is hereby, confirmed and established to the several religious societies to which said missionary stations respectively belong.'

"The reservation is now within the limits of Idaho Territory, the organic act of which, dated March 3, 1863, (12 Stat., 809,) contains no provisions on the subject of the mission claims.

"The first evidence that can be found on the files of this Office of the claim of the said missionary board being asserted to said land after the abandonment, is contained in their notice to Agent Hutchins, at Nez Percé agency, under date of May 2, 1862. The following month Agent Hutchins reported to this Office the fact of said claim having been made by the board, and that it covered the ground on which the agency was situated. It does not appear from the records of this Office that any definite action was taken in reference to the claim of the American board until 1867."

It is stated in a report from the Committee on Indian Affairs of the House of Representatives, made to that body during the last session of Congress, a copy of which accompanied your communication, that on the 17th day of February, 1868, the American Board of Commissioners for Foreign Missions brought their action for possession of the land now in question against James O'Neil, the United States Indian agent, then holding possession of the same as such public officer, which action was returnable into, and duly entered in, the district court of the first judicial district of the Territory of

Nez Percé Reservation—Claim of W. G. Langford.

Idaho, in which district said land lies. In defense of that action, Mr. W. A. George, United States district attorney for that district, appeared and filed a demurrer to the jurisdiction of the court. That demurrer was duly and fully argued and heard before the court at the April term, 1868, Mr. George appearing for the defendant of record. The demurrer was overruled, and the defendant was given until October 7, 1869, within which to file an answer to the bill of complaint. No answer was ever filed, and on the 20th day of December, 1871, W. G. Langford, the party who had succeeded by purchase to said land, and who had been substituted as plaintiff in said proceedings, took judgment by default.

It seems that Langford has since obtained possession of the premises under a writ of possession issued by said district court.

Upon the foregoing state of facts you request my opinion as to the validity of the said judgment, and what steps, if any, can be taken to enable the United States to recover possession of the tract of land in controversy for Indian purposes.

From the above statement, it appears that Langford's title to the land in question rests upon the provisions of the acts of 1848 and 1853, confirming lands occupied as missionary stations among the Indians to the several religious societies to which such stations belong; and I assume, for present purposes, that a title passed by virtue of those acts. Yet it also appears that the district of country within which the land is located was then occupied and claimed by the Nez Percé tribe of Indians, and their right thereto is distinctly recognized and acknowledged by the Government by the treaty of 1855, in which a cession is made to the United States, for valuable considerations, of the whole of the country so occupied and claimed, the tribe reserving thereout, for their future use and occupation, a large tract, the boundaries whereof (which include the said land) are designated in the same instrument.

By the provisions of the treaty all of that tract was to be "set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said tribe as an Indian reservation;" and no white man, except he be in the employ-

Nes Percé Reservation—Claim of W. G. Langford.

ment of the Indian Department, was to be permitted to reside upon the reservation without permission of the tribe and the superintendent and the agent.

The reservation, though subsequently reduced in area by the treaty of 1863 with the same tribe, still included within its limits the land claimed by Langford; and this treaty contains provisions of like import with those adverted to above in connection with the former treaty.

It may be here observed that the tribe hold the reservation, not under the treaty, but under their original title, which is confirmed by the Government in agreeing to the reservation. (See *Gaines vs. Nicholson*, 9 How., 365.)

Thus it would seem that the title imparted by the acts of 1848 and 1853 was at that period, and has ever since continued to be, subject to the Indian right of occupancy in said tribe, the enjoyment of which right, moreover, is assured thereto by the Government by solemn treaty stipulations. Such being the case, it cannot be doubted that, until this Indian right is extinguished, the holder of said title has no right, merely by virtue of that title, to enter upon and take possession of the premises. He may lawfully enter on the land in the mean time, with the permission of the tribe and of the Government, but not otherwise. By entering without such permission he would be an intruder on the reservation, and might be proceeded against summarily under section 2118 of the Revised Statutes, which, besides making him liable to a pecuniary penalty, authorizes the President to "take such measures and employ such military force as he may judge necessary to remove him" from the land.

Now, in regard to the judgment hereinbefore referred to: I think that, without questioning its validity, it really determines nothing adverse to the Indian right. This could not have been made the subject of adjudication in a proceeding to which the tribe was not a party, if, indeed, it was within the competency of the court to subject the tribe to its jurisdiction. Hence the writ of execution founded on that judgment must be regarded as of no effect to give the plaintiff legal possession of land to which the Indian right still adheres; and if he has entered upon the reservation thereunder

Indian Agent in Alaska.

he is simply an intruder, and may be summarily removed therefrom in the manner already indicated.

I have the honor to be, very respectfully, your obedient servant,

GEO. H. WILLIAMS.

Hon. C. DELANO,

Secretary of the Interior.

INDIAN AGENT IN ALASKA.

The President may, subject to the restrictions imposed by section 1224 of the Revised Statutes, direct the military commandant in Alaska to execute the duties of an Indian agent there.

In construing sections 1222 and 2062 of the Revised Statutes together, the latter must be understood as constituting an exception to the former; the rule of interpretation applicable thereto being, that where a general intention is expressed in a statute, and the statute also expresses a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception.

DEPARTMENT OF JUSTICE,

May 5, 1875.

SIR: Your letter of the 28th ultimo directs my attention to sections 1222 and 2062 of the Revised Statutes, and suggests the question whether the present military commandant in Alaska may be authorized to perform the duties of an Indian agent there.

By section 1222 it is declared that "no officer of the Army on the active-list shall hold any civil office, whether by election or appointment, and every such officer who accepts or exercises the functions of a civil office shall thereby cease to be an officer of the Army, and his commission shall be thereby vacated."

But by section 2062 it is provided that "the President may require any military officer of the United States to execute the duties of an Indian agent; and when such duties are required of any military officer he shall perform the same without any other compensation than his actual traveling expenses."

In construing these two provisions, the latter is to be understood as constituting an exception to the former, accord-

Withdrawal of Goods for Exportation.

ing to the well-established rule of interpretation that where a general intention is expressed in a statute, and the statute also expresses a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception. Regarding the matter from this point of view, it is clear that the President has the power to devolve upon an Army officer on the active-list the duties of an Indian agent.

Yet there is another provision in the Revised Statutes which seems to qualify that power slightly. Section 1224 declares that Army officers shall not be employed as disbursing-agents of the Indian Department, where such employment requires them to be separated from their regiments or companies, or otherwise interferes with the performance of their military duties proper.

Subject to this qualification, I am of the opinion that it is competent to the President to direct the military commandant in Alaska to execute the duties of an Indian agent in that Territory.

I have the honor to be, very respectfully,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,
Secretary of War.

WITHDRAWAL OF GOODS FOR EXPORTATION.

Under section 2971 of the Revised Statutes, the owner of merchandise in public store or bonded warehouse has the right to withdraw it for exportation to a foreign country, whatever may be his object in doing so, or whatever may be the disposition he designs to make of the merchandise after it reaches its foreign destination.

So, by section 2979 of the Revised Statutes, the duty of the collector to permit such merchandise to be withdrawn and shipped without payment of duties becomes imperative when the requirements of the statute as to giving security and paying appropriate expenses are complied with by the owner, whatever may be his purpose in withdrawing the merchandise, or whatever he may intend to do with it after its arrival abroad.

After merchandise thus withdrawn and shipped has been landed out of the jurisdiction of the United States, the bond of the owner is discharged, and the merchandise itself acquires a new character relatively to our revenue-laws; and if subsequently re-imported, it stands on the footing of an original importation.

Withdrawal of Goods for Exportation.

Hence, should goods of the same class or description happen *then* to be exempt from duty, such re-imported merchandise would be equally entitled to exemption therefrom.

DEPARTMENT OF JUSTICE,

May 5, 1875.

SIR: Your communication of the 22d ultimo presents for my consideration the question: "Whether goods remaining in warehouse subject to duty, after the passage of a tariff act making goods of like description free, can be exported in bond, and thereafter brought back to this country as an original importation for the purpose of avoiding the duty to which they would otherwise be liable?"

The answer to this question, it appears to me, is governed entirely by the provisions of sections 2971 and 2979 of the Revised Statutes. The first of these sections provides, generally, that all merchandise in public store or bonded warehouse may be withdrawn by the owner for exportation to foreign countries at any time before the expiration of three years from the date of original importation, and that when withdrawn for that purpose it shall be subject only to the payment of such storage and charges as may be due thereon. The other section declares that "if the owner, importer, consignee, or agent of any merchandise on which the duties have not been paid shall give to the collector satisfactory security that the merchandise shall be landed out of the jurisdiction of the United States, in the manner required by the laws relating to exportations for the benefit of drawback, the collector and naval officer, if any, on an entry to re-export the same, shall, upon payment of the appropriate expenses, permit the merchandise, under the inspection of the proper officers, to be shipped without the payment of any duties thereon."

It is to be observed, in reference to these enactments, that section 2971 gives the owner of the merchandise the right to withdraw it for exportation to a foreign country, without regard to his object in doing so or to the disposition of the merchandise after it reaches its foreign destination. Whether he intends to dispose of it in the foreign market, or whether his design is to re-import it again after it is landed there, is entirely immaterial, for aught that appears in the law, and, I

Departmental Advertisements.

think, in no way affects the right of withdrawal conferred thereby. So, on the other hand, section 2979 makes it the duty of the collector "to permit the merchandise, under the inspection of the proper officers, to be shipped without the payment of any duties thereon," upon the owner or his agent giving him security as required and paying the appropriate expenses; and this section is equally free from anything touching the purpose of the owner in withdrawing the goods, or their ulterior disposition by him. Whatever that purpose may be, or whatever the owner may intend to do with the merchandise after its arrival abroad, the duty of the officer to permit the latter to be withdrawn and shipped without payment of duties becomes imperative when the requirements of the statute as to giving security and paying appropriate expenses are complied with by the owner.

After the merchandise thus withdrawn and shipped has been landed out of the jurisdiction of the United States the bond of the owner is discharged, and the merchandise itself acquires a new character relatively to our revenue-laws. If re-imported, it stands on the footing of an original importation; and should goods of the same class or description then happen to be exempt from duty, it would be equally entitled to exemption therefrom. By the withdrawal of the goods for exportation, and their subsequent re-importation, the owner may have avoided the payment of a duty to which they would otherwise have been liable; but this is an advantage of which he cannot be deprived, as it would seem, under the existing law.

I therefore answer your question in the affirmative.

I have the honor to be, very respectfully,

GEO. H. WILLIAMS.

Hon. B. H. BRISTOW,

Secretary of the Treasury.

DEPARTMENTAL ADVERTISEMENTS.

The *proviso* in the act of March 3, 1875, chap. 128, making appropriations for the service of the Post-Office Department, was intended to relieve the heads of all the Executive Departments from the requirements of section 3826 of the Revised Statutes respecting the publication of adver-

Departmental Advertisements.

tisements, notices, and proposals for Virginia, Maryland, and the District of Columbia, as well as to provide specifically respecting the publication of mail-lettings by the Postmaster-General for the States and District above mentioned.

It is, accordingly, left discretionary with each head of Department whether he will make the publication referred to in that section in one or more papers of the District of Columbia.

DEPARTMENT OF JUSTICE,

May 6, 1875.

SIR: I have the honor to acknowledge the receipt of your letter of April 28, 1875, calling my attention to a provision for "advertising" contained in the act of March 3, 1875, making appropriations for the service of the Post-Office Department.

To the item of \$100,000 for advertising a proviso is attached which ends with a clause of repeal. This clause especially your letter brings to my notice, and asks from me an expression of opinion as to the extent of its operation.

The proviso is in the following words: "*Provided, That hereafter the mail-lettings for the States of Maryland and Virginia and the District of Columbia shall be advertised in not more than one newspaper published in the District of Columbia, and at prices satisfactory to the Postmaster-General, not exceeding the customary rates paid in the city of Washington for ordinary commercial advertisements; and so much of section three thousand eight hundred and twenty-six of the Revised Statutes of the United States as refers to the publication of advertisements in newspapers be, and the same is hereby, repealed.*"

Said section 3826 of the Revised Statutes made it obligatory on the heads of the Executive Departments to publish all advertisements, notices, and proposals for Virginia, Maryland, and the District of Columbia in three daily papers published in the District, equally in each as to frequency.

My opinion is that the above-cited proviso was not only intended to provide specifically as to the publication of mail-lettings by the Postmaster-General, but was also intended to relieve the heads of the other Executive Departments from the obligation imposed by said section, and leave the question to them respectively as to whether they will make the publi-

Drawback on Refined Sugars.

cations therein referred to in one or more papers of the District.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

HON. HAMILTON FISH,

Secretary of State.

DRAWBACK ON REFINED SUGARS.

The second *proviso* in section 3 of the act of March 3, 1875, chap. 127, is amendatory of section 3019 of the Revised Statutes, and must be construed in connection with the latter section, not in connection with the enactment in which it is found; the two, (i. e., the *proviso* and section 3019,) in effect, declaring that ten per centum on the amount of all drawbacks allowed by the statute shall be retained for the use of the United States, provided that of the drawback on refined sugars only one per centum of the amount so allowed shall be retained.

Thus construed, that *proviso* unquestionably applies to all refined sugars manufactured from imported sugars, irrespective of the other provisions contained in said act of March 3, 1875.

DEPARTMENT OF JUSTICE,

May 8, 1875.

SIR: I have duly considered the question submitted to me by your letter of the 29th of March in regard to the drawback to be allowed on refined sugars, which is as follows:

“Does the decrease in the amount to be retained from the drawback-allowance on refined sugars, enacted by section 3 of the act of March 3, 1875, apply to all exportations of refined sugars manufactured from imported sugars, when such exportations are made subsequently to the passage of the act, or only to exportations of refined sugars manufactured from crude sugars paying the increased rate of duty prescribed by the act itself?”

Section 3019 of the Revised Statutes, under which the drawback on refined sugars has been heretofore allowed, is as follows:

“There shall be allowed on all articles wholly manufactured of materials imported on which duties have been paid, when exported, a drawback equal in amount to the duty paid on such materials, and no more, to be ascertained under such regulations as shall be prescribed by the Secretary of the

Drawback on Refined Sugars.

Treasury. Ten per centum on the amount of all drawbacks so allowed shall, however, be retained for the use of the United States by the collectors paying such drawbacks respectively."

Section 3 of the act of March 3, 1875, entitled "An act to further protect the sinking-fund and provide for the exigencies of the Government," is as follows :

"Sec. 3. That on all molasses, concentrated molasses, tank-bottoms, sirup of sugar-cane juice, melada, and on sugars according to the Dutch standard in color, imported from foreign countries, there shall be levied, collected, and paid, in addition to the duties now imposed in Schedule G, section 2504 of the Revised Statutes, an amount equal to twenty-five per centum of said duties as levied upon the several articles and grades therein designated: *Provided*, That concentrated melada, or concrete, shall hereafter be classed as sugar dutiable, according to color, by the Dutch standard; and melada shall be known and defined as an article made in the process of sugar-making, being the cane-juice boiled down to the sugar-point, and containing all the sugar and molasses resulting from the boiling process and without any process of purging or clarification; and any and all products of the sugar-cane imported in bags, mats, baskets, or other than tight packages, shall be considered sugar, and dutiable as such. *And provided further*, That of the drawback on refined sugars exported, allowed by section 3019 of the Revised Statutes of the United States, only one per centum of the amount so allowed shall be retained by the United States."

The whole question turns upon the construction to be placed on this second proviso, namely: "That of the drawback on refined sugars exported, allowed by section 3019 of the Revised Statutes of the United States, only one per centum of the amount so allowed shall be retained by the United States." Does this apply to all refined sugars, or only to those upon which the duties are increased by the body of the section?

I have given this subject much consideration, because the opinion I have entertained and still entertain differs from that placed upon the statute by the Treasury Department.

The office of a proviso is, undoubtedly, to take a subject out

Drawback on Refined Sugars.

of the body of the statute, or to restrain or qualify the enacting clause, and for this reason it is generally to be strictly construed. (*Minnis vs. United States*, 15 Peters, 423; *United States vs. Dickson*, *ibid.*, 141.) And any construction of a proviso is inadmissible that makes it manifestly repugnant to the body of the statute. (*Dollar Savings-Bank vs. United States*, 19 Wall., 227.) But it is every-day practice to insert in appropriation and revenue bills, under the words "provided, however," independent statutes, having little or no connection with the subject-matter of the statute itself. The first question in reference to a provision of a statute following those words, therefore, must always be, Is this really a proviso, in the technical sense of that word? If not, the before-mentioned rules have no application.

Now, in the present case, the body of section 3 has no reference to drawbacks at all, but only increases the duties on certain classes of sugars. And, besides this, refined sugars are not mentioned by name in the former part of the statute. The provision in respect to drawbacks is likewise made, in express terms, an act amendatory of the 3019th section of the Revised Statutes. Under these circumstances I cannot doubt that, so far as the rest of section 3 is concerned, this is an independent and distinct enactment—as independent and distinct as if it had been a statute by itself; and, this being so, its construction is a matter of no difficulty. It is an amendment of section 3019 of the Revised Statutes, and must be construed in connection with that section, and not in connection with the act of March 3, 1875; and, so construed, it operates as an exception or proviso in the former statute, and the two, in effect, enact that ten per centum on the amount of all drawbacks allowed by the statute shall be retained for the use of the United States, *provided* that of the drawback on refined sugars only one per centum of the amount so allowed shall be retained. So construed, there can be no question that the improvisation applies to all refined sugars manufactured from ported sugars, without reference to the rest of the act of 1875.

I have honor to be, &c.,

GEO. H. WILLIAMS.

Hon. B. H. BRISTOW,
Secretary of the Treasury.

Case of John R. Hennessey—Bounty.

CASE OF JOHN R. HENNESSEY—BOUNTY.

Enrollment before the proclamation and orders mentioned in the act of April 22, 1872, chap. 114, were issued, does not preclude a claim for bounty under that act, where the company or regiment was mustered into the military service of the United States prior to July 22, 1861, under the said proclamation and orders.

Where the discharge-certificate of a soldier who belonged to a company or regiment thus mustered is in the usual form of one given upon an honorable discharge from the military service, the character of his discharge from service must be deemed to be (what his discharge-certificate represents it to be) honorable, and to entitle him to bounty under said act, whatever may have been the circumstances under which his company or regiment was disbanded.

DEPARTMENT OF JUSTICE,

May 11, 1875.

SIR: I have considered the questions submitted to me in your letter of the 23d of March last, touching the claim of John R. Hennessey for bounty under the provisions of the act of April 22, 1872, (17 Stat., 55.)

The facts of the case are stated by you to be as follows: "Claimant was enrolled in the Fire Zouaves, or Eleventh New York Volunteers, April 20, 1861. The regiment was mustered into the service of the United States May 7, 1861, and mustered out June 2, 1862. Claimant's discharge was in the usual form. The regiment was disbanded, because, after the murder of Colonel Ellsworth, and the desertion, at Bull Run, of a large number of the men, it became demoralized and unserviceable, and also because, having been raised as a special corps, they were unwilling to be merged in any other regiment."

And upon the above statement of facts you propound the following questions: "First, whether enrollment before the proclamation and orders mentioned in the act of April 22, 1872, precludes a claim for bounty; secondly, whether a dishonorable discharge can be imposed by the Executive without the sentence of a court-martial; and, thirdly, whether a discharge under the foregoing circumstances is such an honorable discharge as would entitle to bounty."

The act of April 22, 1872, referred to, provides as follows:

Case of John R. Hennessey—Bounty.

"That every volunteer, non-commissioned officer, private, musician, and artificer, who enlisted into the military service of the United States prior to July 22, 1861, under the proclamation of the President of the United States of May 3, 1861, and the orders of the War Department issued in pursuance thereof, and was actually mustered before August 6, 1861, into any regiment, company, or battery, which was accepted by the War Department under such proclamation and orders, shall be paid the full bounty of one hundred dollars, under and by virtue of the said proclamation and orders of the War Department, in force at the time of such enlistment and prior to July 22, 1861: *Provided*, That the same has not already been paid."

This act applies to those who "*enlisted into the military service of the United States prior to July 22, 1861,*" under the proclamation of May 3, 1861, and the orders mentioned, and who were "*actually mustered before August 6, 1861, into any regiment,*" &c., which was accepted by the War Department under such proclamation and orders. The case presented is that of a regiment which was mustered into the military service of the United States on the 7th of May, 1861, under the proclamation and orders referred to, but whose members were enrolled prior to the date of the proclamation. I do not think the circumstance that the men of this regiment were *enrolled* before the call is at all material. They did not thereby become enlisted into the United States military service, as it does not appear that their enrollment took place under the authority of the United States. But when, afterward, they were mustered into that service, they then became, to all intents and purposes, enlisted therein; so that the claimant is to be regarded as having been enlisted and mustered into the military service of the United States at the same time, viz, on the 7th of May.

To your first question, then, I answer, that enrollment before the proclamation and orders mentioned in the act of April 22, 1872, does not preclude a claim for bounty, where the company or regiment was mustered into the military service of the United States prior to July 22, 1861, under the said proclamation and orders.

The soldier's discharge-certificate, in this case, is in the

Case of John B. Hennessey—Bounty.

usual form of that given upon an honorable discharge from the military service; and whatever may have been the circumstances under which his regiment was disbanded, the character of his discharge from service must be deemed to be, what his discharge-certificate represents it to be, honorable. I therefore answer your third question in the affirmative.

The conclusion just stated seems to render the consideration of your second question unnecessary, and I accordingly express no opinion thereon.

The papers which accompanied your letter are returned herewith.

I have the honor to be, very respectfully,

GEO. H. WILLIAMS.

Hon. WM. W. BELKNAP,

Secretary of War.



OPINIONS

OF

OFFICERS OF THE DEPARTMENT OF JUSTICE,

* APPROVED BY THE ATTORNEY-GENERAL.

MAIL-SERVICE.

The 4th section of the act of June 14, 1858, chap. 164, applies to mail-service by sea between the United States and foreign countries, and not to that between ports or places within the limits of the United States; hence it is inapplicable to the route from San Francisco, Cal., by sea, to San Diego, Cal.

Nor does section 14 of the act of March 3, 1845, chap. 43, apply to contracts for carrying the mail over that route.

It is the duty of the Postmaster-General, before contracting for regular mail-service upon said routes, to advertise as required by the 10th section of the act of March 3, 1825, chap. 64, and its supplements.

DEPARTMENT OF JUSTICE,
January 17, 1872.

SIR: I have considered the questions presented in the letter of the Postmaster-General of the 13th instant, relating to the letting of United States mail service from San Francisco to San Diego, and have the honor to submit my opinion thereon.

The act of August 3, 1854, entitled "An act to establish certain post-roads," establishes one "from San Francisco, (by sea,) by Monterey, San Luis Obispo, Santa Barbara, and San Pedro, to San Diego." (10 Stat., 543.)

* NOTE.—Section 358 of the Revised Statutes provides as follows: "Any question of law submitted to the Attorney-General for his opinion, except questions involving a construction of the Constitution of the United States, may be by him referred to such of his subordinates as he may deem appropriate, and he may require the written opinion thereon of the officer to whom the same may be referred. If the opinion given by such officer is approved by the Attorney-General, such approval, indorsed thereon, shall give the opinion the same force and effect as belong to the opinions of the Attorney-General."

Mail-Service.

The Postmaster-General asks whether this service is to be treated like ordinary land-routes, and contracted for under the provisions of the various acts of Congress regulating the manner of letting the contracts for mail-service, by advertisement and bidding; or, secondly, whether the service on this route may be contracted for without previous advertisement, under the provisions of section 14 of the act of March 3, 1845, (5 Stat., 737;) or, thirdly, whether in respect of this route he is to be governed by section 4 of the act of June 14, 1858, (11 Stat., 364.)

In considering these questions I will reverse the order in which they are propounded.

The section last referred to is as follows: "That it shall not be lawful for the Postmaster-General to make any steamship or other new contract for carrying the mails on the sea for a longer period than two years, nor for any other compensation than the sea and inland postages on the mails so transported."

Although a literal reading of the first clause of this section embraces the service now under consideration, the last clause makes the section clearly inapplicable to service on the route. The compensation fixed in that clause is "the sea and inland postages on the mails so transported." This was manifestly intended to apply to the foreign service, where there are two postages, one for the sea and one for the land. The route from San Francisco to San Diego, having its terminal points and all intermediate points within the United States, is manifestly domestic service, upon which the postage is single as fixed by section 22 of the act of March 3, 1863, (12 Stat., 705.)

It, therefore, seems clear that the 4th section of the act of June 14, 1858, was not intended to apply to, or regulate, mail service on this route.

Section 14 of the act of March 3, 1845, is in these words: "That the Postmaster-General shall have power, and he is hereby authorized, to contract with the owners or commanders of any steamboat plying upon the western or other waters of the United States, for the transportation of the mail for any length of time or number of trips less than the time for which contracts for transporting the mail of the United States are

Mail-Service.

now usually made under existing laws, and without the previous advertisement now required before entering into such contracts, whenever, in his opinion, the public interest and convenience will be promoted thereby: *Provided*, That the price to be paid for such service shall in no case be greater than the average rate paid for such service under the last preceding or then existing regular contract for transporting the mail upon the route he may so, for a less time, contract for the transportation of the mail upon."

It would seem to require no elaborate argument to prove that the sea is not embraced within the term "western or other waters of the United States." The act of Congress which establishes the route in question in terms declares it to be "by sea," and it is apparent that vessels passing, by sea, from San Francisco to San Diego must pass without the limits of the United States. It may be difficult to determine why Congress should have given to the Postmaster-General power to contract for carrying the mails on the "western or other waters of the United States," without previous advertisement, and at the same time withheld the power upon routes by sea between two points or places in the United States. But whatever may have been the reason upon which Congress acted, the Executive Departments of the Government must accept the law as Congress has made it.

I am of opinion that the section of the act of 1845 has nothing whatever to do with contracts for carrying the mail by sea from San Francisco to San Diego.

The 10th section of the act of March 3, 1825, (4 Stat., 104.) requires "the Postmaster-General to give public notice in one newspaper published at the seat of Government of the United States, and in one or more of the newspapers published in the State or States or Territory where the contract is to be performed, for at least twelve weeks before entering into any contract for carrying the mails, that such contract is intended to be made, and the day on which it is to be concluded, describing the places from and to which such mail is to be conveyed, the time at which it is to be made up, and the day and hour at which it is to be delivered." The language of this section is very broad and comprehensive, and embraces all contracts for carrying the mail.

Mail-Service.

The 14th section of the act of March 3, 1865, (13 Stat., 507,) reduces the period of the advertisement from twelve to six weeks, and changes the number of newspapers in which the advertisements are to be made, but does not otherwise affect the 10th section of the act of 1825.

From time to time, since the passage of the act of 1825, Congress has passed exceptional statutes, taking out of the operation of that act certain classes of mail-service; but I have not found any statute which brings the service on the route from San Francisco to San Diego within any of the exceptions, or takes it out of the requirement of the 10th section of said act, unless such be the effect of the 5th section of the act of March 25, 1864, (13 Stat., 371,) which provides: "That the Postmaster-General may, if he shall deem it for the public interest, enter into contracts for any period not exceeding one year for the transportation of the mails in steamships by sea between any of the ports in the United States." The obvious purpose of that section is to authorize the Postmaster-General to enter into contracts, "for any period not exceeding one year," for the transportation of mails in ships by sea upon routes not before established by law, and does not appear to have been designed to make any other change in the law.

I am, therefore, of opinion that it is the duty of the Postmaster-General, before entering into a contract for regular mail-service upon the route in question, "from San Francisco, (by sea,) by Monterey, San Luis Obispo, Santa Barbara, and San Pedro, to San Diego," to advertise the same as required by the 10th section of the act of 1825, and amendments thereto.

I may add that the power of the Postmaster-General to make temporary contracts in cases of failure to comply with bids is a matter not presented in his letter, and which I have not considered.

Very respectfully, your obedient servant,

B. H. BRISTOW,

Solicitor-General.

Hon. GEO. H. WILLIAMS,

Attorney-General.

Approved :

GEO. H. WILLIAMS.

Case of the Edgar Stewart.

CASE OF THE EDGAR STEWART.

Where a portion of the crew of the steamer *Edgar Stewart* forcibly displaced the master thereof from command, and took possession of the vessel: *Held* that this did not constitute the offense of piracy, but of mutiny; that for the latter offense the parties charged are liable to be tried and punished under the laws of the United States; and that they may be tried therefor in any district in which they are first brought.

DEPARTMENT OF JUSTICE,

May 2, 1872.

SIR: I have duly considered the case of the American steamer *Edgar Stewart*, upon which your opinion is asked by the Secretary of State in his letter of the 1st instant.

I do not think that the offense, as detailed in the letter of the United States consul to the Assistant Secretary of State of the 15th ultimo,* and which the Secretary of State inclosed to you, amounts to piracy; and if it was technical piracy it would be unnecessary to send the seamen home for trial, as they could be tried just as well at Kingston.

But it is very clear that the Cubans who shipped at New London as seamen, and afterward forcibly took possession of the vessel and displaced the captain from his command, were guilty of mutiny, and therefore are punishable by the laws of the United States, (see act of April 3, 1790, section 8, 1 Stat., 113, as amended by the act of March 3, 1835, section 1, 4 Stat., 475.) They should be sent home by the consul, and can be tried in any district into which they are first brought. The case in its facts bears very strong resemblance to that of the whaling-ship *Junior*, the mutineers of which were tried and

* NOTE.—The facts presented in the consul's letter are, in substance, these: The steamer cleared from New London, Connecticut, with a cargo of arms and ammunition; its crew, including officers, consisting of thirty-six men, of whom sixteen were Cubans who had shipped as seamen. When midway between Jamaica and Cuba the command of the steamer was forcibly taken from the master by the Cubans on board, and it was then run by the latter to the coast of Cuba, where eight armed Cubans and two Americans were sent ashore in a small boat. Being now pursued by a Spanish gunboat, the steamer set out to sea and escaped. The command thereof was then restored to the master, who, by direction of the leader of the Cubans, brought the vessel to Kingston, Jamaica, where, on the complaint of the master, the offenders were placed in custody.

Mileage.

convicted of murder and mutiny in the circuit court of Massachusetts about fifteen years since.

I have the honor to be, sir, very respectfully, your obedient servant,

CLEMENT HUGH HILL,
Assistant Attorney-General.

Hon. B. H. BRISTOW,
Solicitor-General and Acting Attorney-General.

Approved:

B. H. BRISTOW,
Solicitor-General and Acting Attorney-General.

MILEAGE.

Where a naval officer traveled under orders from New York to San Francisco via the Isthmus of Panama in the years 1859 and 1860, (before the opening of the overland route:) *Held* that, under the 2d section of the act of March 3, 1835, chap. 27, he was entitled to an allowance of ten cents per mile for traveling-expenses.

DEPARTMENT OF JUSTICE,
May 3, 1872.

SIR: I have considered the question submitted to the Attorney-General by the Secretary of the Navy in his letter of April 27, in regard to the mileage of Commodore S. P. Bissell, of the Navy.

The case is submitted by the honorable Secretary without any statement of facts by him, but upon papers inclosed—a form of submission which is not to be recommended, as it sometimes renders it very difficult to determine exactly the point or points upon which an opinion is desired.

As I understand the question, however, in the present case, the opinion of this Department is asked as to whether Commodore Bissell is entitled to his actual traveling-expenses, or to mileage at the rate of ten cents a mile, when traveling under orders from New York to San Francisco via the Isthmus of Panama in the years 1859 and 1860, (before the opening of the overland route.)

Mobile and Ohio Railroad Company.

The only law to which I have been referred or which I find upon the subject is the 2d section of the act of March 3, 1835, (4 Stat., 757,) which is as follows: "That no allowance shall hereafter be made to any officer in the naval service of the United States for drawing bills, for receiving or disbursing money, or transacting any business for the Government of the United States, nor shall he be allowed servants or pay for servants, or clothing or rations for them, or pay for the same, nor shall any allowance be made to him for rent of quarters or to pay rent for furniture, or for lights or fuel or transporting baggage. It is hereby expressly declared that the yearly allowance provided in this act is all the pay, compensation, and allowance that shall be received, under any circumstances whatever, by any such officer or person, except for traveling-expenses when under orders, for which ten cents per mile shall be allowed."

This seems to me to place the matter beyond a doubt. A naval officer is allowed by its express terms, for traveling-expenses when under orders, the sum of ten cents a mile. What the actual traveling-expenses of such officer may be has nothing to do with the allowance made to him.

I have the honor to be, sir, very respectfully, your obedient servant,

CLEMENT HUGH HILL,
Assistant Attorney-General.

Hon. B. H. BRISTOW,
Solicitor-General and Acting Attorney-General.

Approved:

B. H. BRISTOW,
Solicitor-General and Acting Attorney-General.

MOBILE AND OHIO RAILROAD COMPANY.

In June, 1865, the Mobile and Ohio Railroad, being then in the possession of the military authorities of the United States, was, under a general order issued thereby, turned over to the company owning the road, to be worked by such company on its own account, subject to the condition that the company should "carry all Government freight at such tariff as may be established by the Quartermaster-General." Troops and Army stores were subsequently transported over the road, for which service, up to

Mobile and Ohio Railroad Company.

November 1, 1865, payments were made to the company at rates established by the Quartermaster-General, and receipts in full were given by the company therefor without protest: *Held* that no claim is admissible for additional compensation in respect of such service on the ground that the company was entitled to more than what was paid; the acceptance of the amount allowed by the military authorities, and the receipt given therefor, constituting a final settlement as between the Government and the company.

The reference to the "fares and tolls allowed to northern railroads," in the bond given by that company to the United States, dated November, 1, 1865, for rolling-stock, &c., purchased from the Government, is to be understood as meaning the fares and tolls allowed by the general regulations of the Quartermaster's Department to railroads in what were known as the "Northern States" in contradistinction to the Southern or former slave-States; it does not include railroads in what were called the "border States."

Where a contract is entered into with a land-grant railroad company for the transportation of troops or military supplies over its road at certain rates, the Quartermaster-General cannot, without such company's consent, make any deduction from those rates as a composition for the relinquishment of any right which the Government may have, under the conditions of the land-grant, to use the road itself for the purpose of transporting the troops and supplies "free from toll or other charge."

DEPARTMENT OF JUSTICE,

May 3, 1872.

SIR: You have requested me to prepare an opinion in the case of the Mobile and Ohio Railroad Company, now pending before the Second Comptroller, upon a claim for additional compensation for transporting troops and property of the United States, which was referred to this Department for an opinion, by the Secretary of the Treasury, in his letter of March 16, and in which an argument by the counsel for that company was heard by the Attorney-General, yourself, and me before the Attorney-General's departure from the city.

The facts in the case are in many respects complicated, and also somewhat conflicting; but, in the view which I have taken of the case, many questions of fact which seem to be in dispute between the Government authorities and the railroad company are immaterial.

The Mobile and Ohio Railroad was in the military occupation of the United States at the close of the war, and on the 5th of May, 1865, Major-General Canby ordered that the railroad, with its offices, stations, locomotive-engines, rolling-

Mobile and Ohio Railroad Company.

stock, and all other material and property belonging to it, so far as it was under the control of the United States military authorities and within the limits of his command, should be turned over to the president and directors, to be managed and run by them under regulations established by them and on such conditions as might be imposed by military authority, "but this order will not be considered as barring any questions of private interests that may be involved in this property, or as barring or restraining any legal proceedings that may hereafter be instituted against" such company.

On the 5th of June following, and before the whole railroad had been delivered over to the railroad company, General Canby issued a general order that "all railroads within the limits of this department, except such as may be absolutely necessary for the Government to run, will be turned over to the companies owning them, to be worked on their own account, subject to the condition that they shall first comply with the requirements of the 13th section of the Treasury regulations of May 9, 1865, and that they shall carry all Government freight at such tariff as may be established by the Quartermaster-General."

The rest of the road was thereupon delivered over to the railroad company, and the public stores and troops of the United States transported over the road, and in the letter of the Second Comptroller it is stated that rates as established by the Quartermaster-General were paid up to November 1, 1865, for such transportation, and receipts given by the proper officers of the railroad corporation without protest. If this was so, it is very clear, under recent decisions of the Supreme Court, that no claim can now be made for additional compensation for these services. The acceptance of such an amount as the Government authorities allow on any account, and the receipt in full therefor such as is required in the Treasury Department, is a final settlement of such account, and no claim can be subsequently made in respect thereof on the ground that the amount paid was accepted as payment on account, or was not all that the claimant was entitled to. This doctrine, established by the Supreme Court in the case of the United States against Adams (7 Wall., 163, and 9 Wall., 554,) has been re-affirmed during the past winter in the most

Mobile and Ohio Railroad Company.

explicit terms in the cases of the United States against Child, (12 Wall., 232,) and United States against Clyde, (13 Wall., 35.) The last case, particularly, is decisive of the present question.

This disposes of the first question in the case as stated by the Second Comptroller, and it would not be right for this Department to volunteer an opinion upon so important a question as the right of the Government to fix the rates of transportation under General Canby's order, in a case in which its decision is not necessary.

The second question involves the construction of the condition of the bond given by the Mobile and Ohio Railroad Company to the Government, dated November 1, 1865, a bond in the penal sum of eight hundred and forty-four thousand dollars, which recited that the said company had received, or were about to receive, from the War Department rolling-stock, iron rails, and other material for repairing and operating its railroad, upon a credit of two years, payable in equal monthly installments, with interest at the rate of seven and three-tenths per cent. per annum, within the said two years, either in cash or in transportation of troops and military supplies of the United States, under the orders of the proper military authorities, at the rates of "fare and tolls allowed for such services to northern railroads."

The question is, what is meant by the reference to the rates allowed to northern railroads? It appears that on the 1st of May, 1862, regulations were established by the Quartermaster-General, in accordance with the recommendation of the convention of railroad managers which had been held in Washington by invitation of the Secretary of War, establishing rates to be paid to railroad companies for the transportation of troops and supplies belonging to the Government. Certain exceptions were made to the general application of these regulations, and certain railroad companies in the States of Maryland, Virginia, Kentucky, Tennessee, and Missouri, seven in all, I believe, were allowed their ordinary rates on account of their proximity to the seat of war, and for other reasons which seemed to make their position different from those railroads farther north.

The claim of the Mobile and Ohio Railroad Company is,

Mobile and Ohio Railroad Company.

that they, being situated in States which had been the seat of war, fall within the principles which had been applied to the excepted railroads above referred to, and not those which had been applied to the railroads in the Northern States generally, and that they are therefore entitled under this contract to the rates paid to these excepted roads, or at least to the average rate paid to the northern roads, including not only those covered by the regulations, but likewise those excepted from them. But it seems to me very clear that both positions are untenable. When northern railroads are mentioned, I cannot have any doubt that reference is made to the railroads in the Northern States; and none of the late slave-States have ever been included in such a designation. After the war began, those of the former slave-States which continued more or less loyal to the Government were sometimes designated as "the border States," "the loyal slaveholding States," &c., and would probably come within the designation in the bond if that had been "the loyal States;" but they had not been then, nor are they now, in ordinary parlance, included within the term "the Northern States," and I cannot believe that they are referred to in this contract. But there is another view of the case, which is equally decisive: these are exceptions to the regulations generally in force throughout the country; and when reference is made to any contract or regulation, the general rule of the contract or regulation, and not any exception in it, is meant. This would seem almost too clear for argument, and it necessarily follows that the rate to be allowed under the bond of November 1, 1865, is the rate allowed by the Government to the northern railroads, and not to the excepted railroads lying in the border States; nor are these to be considered at all in fixing the compensation.

The third and, perhaps, the most important question in the case remains to be considered. By the act of Congress of September 20, 1850, (9 Stat., 466,) the Mobile Railroad Company received a grant of land in aid of the construction of a railroad from Chicago to Mobile, and which was likewise made to the Illinois Central Railroad. The 7th section of that act provides "that the said railroad and branches shall be and remain a public highway for the use of the Government of

Mobile and Ohio Railroad Company.

the United States, free from toll or other charge upon the transportation of any property or troops of the United States." (9 Stat., 467.) Attorney-General Akerman, in an opinion given to the Secretary of War, dated November 20, 1871, decided that under this statute the Mobile and Ohio Railroad Company became a public highway, within the meaning of this section, for its entire length. (See 13 Opin., 536.)

When railroads were first established, the first idea was that of an iron turnpike over which the public would have a right to draw, by steam, their own vehicles upon paying a reasonable toll therefor, as was allowed on turnpikes and canals; and all the earlier roads in their acts of incorporation had provisions looking to this purpose. Experience has demonstrated that any such use of a railroad-line would be impracticable, and, even if it were practicable, in the highest degree dangerous, and the consequence is that the whole design has now been abandoned. But the Government still seems to have reserved a right in roads to which it had granted lands, to put its own engines and trains upon the line and to carry them free of toll. Instead of so doing, however, the Quartermaster-General seems to have established the rule of deducting one-third from the rates fixed for the transportation of Government troops and stores as an equitable composition for this right possessed by the Government, and which it could at any time enforce, no matter how detrimental it might be to the general business of the line. That such a composition would be as beneficial to the railroad company as to the Government is very apparent, but no right is reserved by the Government in the grant made to the road to enforce any such composition upon a railroad without its consent. And if the Government makes a contract for the transportation of troops and other materials with a railroad company, and agrees to pay at a certain rate for so doing, and makes no reference to the original right reserved, or to any composition therefor, as it may do, the railroad company becomes entitled to receive the full amount fixed by the contract without any reference to the rights of the Government under the act granting the land. If Congress had reserved in such act not only the right to use the road free of toll, but likewise the alternative right to have men and property

Mobile and Ohio Railroad Company.

transported at a lower rate than the public generally, there is just the same ground for arguing that a deduction was to be made from the amount fixed by any subsequent contract as provided by the act of Congress, although even then this would admit of question, and is a point upon which I express no opinion.

But where the Government, without enforcing its rights, makes a special contract and fixes a special rate, which it agrees to pay to the railroad company for transporting troops or property belonging to the Government, the fact that it has a right, if it likes, to use the road for nothing, and that such right might equitably be compounded by a deduction of a certain amount from ordinary rates, has no bearing upon the contract after it has been made, however proper to be considered by the parties at the time of making it. On the contrary, the fact that the Government, with this right existing, has made a contract with a railroad and agreed to pay it a certain rate for the transportation of men and property, would seem strongly to indicate that the right had been considered by the parties at the time the contract was made, and the rates therein fixed were a sufficient deduction from ordinary rates to include a composition for the relinquishment of the right to use the road within the extent of the contract. I am aware that the Quartermaster-General has made these deductions, and that "land-grant railroad" companies have assented very frequently, perhaps generally, to the deduction he has made; but the deduction has no force except as a matter of contract between the parties; and because one or ten or twenty railroads have assented to the deduction, that gives no right to make a similar deduction from the rates allowed by special contract to a twenty-first railroad; the only force which such a composition can have being merely what belongs to a contract between the Government and each of the railroads which agrees that it should be substituted for the right possessed by the Government of using the railroad with its own engines and cars.

It has been suggested, in support of the right to make this deduction, that the Quartermaster-General has established a general rule, fixing a deduction of thirty-three per cent. as composition for the right which the Government enjoys to use

Mobile and Ohio Railroad Company.

land-grant railroads, and that this rule has become a general and notorious usage of the Government, which establishes a custom that all railroads must take notice of, and that railroad companies must be presumed to contract in reference to it. But, passing by all other objections to such a proposition, the decisive answer to it is, that the Quartermaster-General has no power to fix a certain deduction as a composition for this right which is binding even upon the Government. The right to use a railway is a right reserved to every Department of the Government, and the fact that the Quartermaster-General makes one composition in respect thereof for military purposes does not prevent any other Department from making a separate and distinct composition, or from asserting their right to use the road itself in case they have occasion so to do; and consequently no composition established by the Quartermaster-General, no matter how generally it might be accepted, can have any force as a general composition for the rights of the Government. And, indeed, it is difficult to see how power is vested in any body except Congress to fix a deduction of thirty-three per cent., or forty per cent., or fifty per cent., or even a larger deduction still, as a general composition, so as to bar or affect the rights of the Government, and *a fortiori* such compositions cannot affect the rights of railroads. The joint resolution of March 6, 1862, (12 Stat., 614,) which authorized the Secretary of War and Quartermaster-General to compound for the use of the railroads without waiving any right which the United States possessed under the act granting lands to those roads, does not, in my opinion, at all change or affect the question in respect of whether the Quartermaster-General can compel a railroad to accept a composition which he has established, or whether such a composition is anything more than a special contract between the Government and any railroad accepting it.

It follows that the Government is not entitled to deduct thirty-three and one-third per cent. from the rates fixed by the contract of November 1, 1865, with the Mobile and Ohio Railroad.

It may be proper, considering the importance of this case, to say that the Attorney-General considered it alone, and in consultation with us, before he left the city, and that upon

Effect of Pardon—Remission of Fine.

the second and third points he expressed views similar to those which I have above stated.

I have not answered categorically the questions put in the letter of the Second Comptroller, because, on studying the case, I came to the conclusion that the questions presented by it were the three that I have above answered, and I think that my answers to these dispose of all the points of law presented. The questions, if there be any at issue between the Quartermaster-General's Office and the accounting-officers of the Treasury, in respect of the power of the latter to change the amount fixed or allowed by the Quartermaster-General's Department in any given case, ought to be presented in a much more explicit form than they are by any papers transmitted in this case, if the opinion of this Department is desired upon them.

I have the honor to be, sir, very respectfully, your obedient servant,

CLEMENT HUGH HILL,
Assistant Attorney-General.

Hon. B. H. BRISTOW,
Solicitor-General and Acting Attorney-General.

Approved:

B. H. BRISTOW,
Solicitor-General and Acting Attorney-General.

EFFECT OF PARDON—REMISSION OF FINE.

Where a person convicted of a crime against the United States was sentenced to fine and imprisonment, and subsequently received an unconditional pardon from the President, but previous thereto had paid the amount of the fine to the marshal, by whom it was deposited in court, where it still remains: *Held* that the fine was remitted by the pardon, and that the money should now be restored to the person pardoned.

A pardon by the President works a remission of a pecuniary penalty already paid, unless the money has actually passed into the Treasury, (overruling the decision in 10 Opin., 1.)

DEPARTMENT OF JUSTICE,
June 28, 1872.

SIR: District-Attorney Harrington, of the eastern district of Arkansas, asks for instructions as to his course in the

Effect of Pardon—Remission of Fine.

matter of Charles Leoni's fine, and makes the following statement of facts:

Leoni was convicted of passing counterfeit money, and was sentenced to both fine and imprisonment. On the 24th of May last, he received an unconditional pardon from the President. In the mean time the marshal had received the full amount of the fine and costs, and, on the 17th instant, he paid the money into court, where it now remains. The district-attorney has moved that this money be deposited to the credit of the Treasurer of the United States, and Leoni's counsel that it be refunded to him, on the ground that the pardon remitted the fine, and that it is not now too late for such remission to take effect. The action of the court is suspended.

There is an opinion of Attorney-General Stanton (10 Opin., 1) exactly covering this case. Mr. Stanton says, in regard to a similar state of facts, "the money thus paid to the marshal * * * ought to be accounted for, and paid over, by the marshal, as money belonging to the United States. The President's remission of a penalty after it has been paid is of no effect." But this view of the question does not seem to be sustained by the authorities.

The effect of a pardon is to restore the person pardoned, as far as is possible, to the condition in which he would have been if he had never been convicted. (See *United States vs. Wilson*, 7 Pet., 150; 1 Bishop Crim. L., § 713; *The King vs. Greenvelt*, 12 Mod., 119; *In re Deming, alias Daniels*, 10 Johns., 232; 12 Opin., 81.) Such complete restoration must include a restitution of the fine, unless some insurmountable obstacle intervenes. Is there any such obstacle in a case like this? In the opinion of Attorney-General Cushing, there is not. He says, in his opinion of January 1, 1857, (8 Opin., 281,) speaking of a similar case, that, although the forfeiture be consummated, so far as the guilty party is concerned, and the money has passed into the hands of some Government officer, it may still be refunded by executive warrant, in execution of a pardon, as long as the payment was not in such form as to constitute "complete severance from intermediate official custody and absolute entry into the Treasury." He also says: "If this money had actually passed into the Treasury, by a covering warrant or otherwise, it could not, in my

Rancho "Guadalupe."

opinion, be refunded without authority of Congress." This only on account of the constitutional provision "that no money shall be drawn from the Treasury but in consequence of appropriations made by law."

In the case of *Brown vs. The United States*, (1 Woolw. C. C., 198,) it was held that where the proceeds of the sale of confiscated property were still in the hands of the marshal they were restored by a pardon. The court, Miller, J., said: "It is my opinion that, until an order of distribution * * * is made, or until the proceeds are actually paid into the hands of the party entitled, as informer, to receive them, or into the Treasury, * * * they are within the control of the court; that no vested right to those proceeds has accrued so as to prevent the pardon from restoring them to the petitioner."

On the whole, the law seems to be that a pardon by the President restores pecuniary penalties already paid to an officer of the Government, unless the money has actually passed into the Treasury.

It is my opinion, therefore, that the amount of Charles Leoni's fine and costs must be returned to him as having been remitted by pardon.

Respectfully submitted.

EDWARD ROGERS FRENCH,
Pardon Clerk.

Hon. GEO. H. WILLIAMS,
Attorney-General.

Approved July 2, 1872:

GEO. H. WILLIAMS.

RANCHO "GUADALUPE."

In this case, (which involves the validity of two patents issued upon a California private land-claim, one in 1866 and the other in 1870—both, however, having been afterward recalled by the Land Department,) upon the facts submitted, *held* that there was no legal authority for issuing the second patent, and that the first patent should be delivered to the confirmees of the claim.

Rancho "Guadalupe."

The provision in the act of June 14, 1860, chap. 128, that notice of the survey and plat made by the surveyor-general of California be given by advertisement, requires a period of four weeks to elapse between the first insertion and the act to be done (i. e., the removal of the plat, &c., from the surveyor-general's office) which such notice is to precede, the insertions being repeated once a week in each week during the same period.

Advertisement of said notice was made at Santa Barbara, in a newspaper called the "Santa Barbara Gazette," which was printed in San Francisco and thence immediately sent to Santa Barbara for distribution, where it was distributed: *Held* that Santa Barbara may be regarded as the "place of publication" of the paper, and (as far as that is material) the requirement of the statute complied with.

DEPARTMENT OF JUSTICE,
March 10, 1873.

SIR: I have considered the questions submitted by you in your communication of the 23d of December last, in relation to the California private land-claim, Guadalupe, &c., and have the honor to submit the following reply:

Before beginning that, however, I may say that I have not opened the record, which, at a subsequent period, was transmitted here in order that, if I should "see proper so to do," I might "find the facts for myself." Partly because I did not understand that it was your wish that I should so find the facts, and partly because I understand that some important facts at issue are not contained in the record, but depend upon the weight to be attributed to certain affidavits therewith transmitted, I had no desire to complicate myself with questions of fact belonging to another Department, and am entirely willing to take these at your hands.

I will add that the delay which has occurred in making this reply has arisen from a desire to hear all that might be said in behalf of the claimants—a desire which I understand to be fully shared by yourself.

The questions concern the comparative validity of two patents under the same land-claim, one issued in 1866 and the other in 1870.

The former patent was issued, as was supposed, under the provisions of the act of June 14, 1860.

Those provisions, so far as they are material here, required that the surveyor-general of California should cause to be

Rancho "Guadalupe."

made a survey, and a plat thereof, and thereupon give notice of the same, &c., by publication, "once a week for four weeks, in two newspapers, one published at Los Angeles, and one of which the place of publication is nearest the land, * * and until the expiration of such time the survey and plat shall be retained in his office, subject to inspection."

Advertisement was made in a paper at Los Angeles, and also in the "Santa Barbara Gazette." The first insertion in the former paper was on the 23d of February, 1861, and the last on the 16th of March, 1861; in the latter, the like insertions were of February 14 and of March 7, 1861. Besides this, the latter paper "was printed in the city of San Francisco, and, as soon as printed, sent to Santa Barbara for distribution, and distributed there;" and no other paper was published there.

The patentee refused to receive the patent of 1866, and upon his remonstrances and suggestions that patent was recalled, and another survey ordered, the proceedings under which ended in issuing the patent of 1870; which, after it had been signed and sealed, and had been sent to the surveyor for delivery, was, without the consent of the patentee, recalled by the Commissioner of the General Land-Office.

The proceedings ending in the patent of 1866 were *ex parte*. No one objected to their progress. The means of resistance or of correction, provided in the act of 1860, were not resorted to.

The first notice which the United States had of objection by the claimant was his refusal to receive the patent; and it is probable that (as is alleged) the first actual notice which such claimant had of these proceedings was the tender of that patent. His reason for refusing it was, that it did not cover a large part of the tract claimed.

It seems to me that, if the proceedings terminating in the patent of 1866 were *regular*, there is no way short of an act of Congress of relieving the claimant from the injury which these proceedings may have caused.

The *steps* in those proceedings are, (1) a survey and plat made and returned to the office of the surveyor-general; (2) an advertisement for a certain time in certain papers; (3) the retention of the survey and plat in the above office dur-

Rancho 'Guadalupe.'

ing that time; (4) liberty, for such period, to persons interested, to have the survey and plat returned into the district court of the United States for the purpose of being litigated, corrected, or set aside; (5) after such period, the transmission of the plat or the survey to the General Land-Office at Washington, for a patent.

After the lapse of the period for retaining the plat and survey in the office of the surveyor-general, without intervention by any party interested, if the other preliminaries have been duly performed, there is no provision for making complaint or for correcting the result, and in such case, it seems to me, if any injury has been done, the only appeal left is to Congress.

That there was no power in the district court before the act of July 1, 1864, or, since then, in the Commissioner of the General Land-Office, to grant a resurvey, &c., after such lapse, appears the more clearly by the provision in the 5th section of the act of June 14, 1860, to the effect that, in such case, the plat and survey should, of *themselves*, have the force and the validity of a patent issued, *i. e.*, that in such event the case should be considered as *ended*.

A view opposite to this has been called to my attention, on behalf of the claimant. In accordance with that, it is said that the action by Mr. Commissioner Wilson in setting aside the patent of 1866 and granting a resurvey is analogous to the granting of a new trial by a court, in this, that after such resurvey had it is not competent for any tribunal to set it aside because of any insufficiency in the grounds upon which it was granted.

Prima facie, I should have been disposed, as above, to doubt the power of the Commissioner to grant a *new trial* (as it were) in any case where the proceedings are *regular*. But I am told that the *course of proceeding* in these cases, while pending in the Department of the Interior, renders it unnecessary to consider this point; such *course* being, that appeals to the Secretary of the Interior from the Commissioner bring up for review all orders in the cause, interlocutory or other, made by the latter from the beginning.

It is also said that the act of 1860, which gave to the district court jurisdiction over issues raised in such cases of

Rancho "Guadalupe."

survey, has been repealed by the act of July 1, 1864, and that such jurisdiction, at the time that Commissioner Wilson granted a resurvey, was vested in the General Land-Office.

The reply to this is, that at the time of the passage of the repealing act the district court had lost jurisdiction over this particular case through the imputed *laches* of the claimant, and, that so, there was then no jurisdiction in the present case to be transferred.

It is also urged in behalf of the claimant that the proceedings upon which the patent of 1866 was based were *irregular*, because the constructive notice given by the advertisements was defective in the following important particulars:

1. The period of four weeks did not, as required by the statute of 1860, (?) elapse between *the first and last insertions* of such advertisements.

2. The "Santa Barbara Gazette" was not a paper published at Santa Barbara, within the meaning of the act.

On the first point my attention has been called to many authorities; some in the courts of the United States, and others in those of States. There is some discrepancy among them. In my opinion, what is required by the statute before me is, that the period of four weeks shall elapse between the first insertion and *the act to be done* (that is, the removal of the plat, &c., from the surveyor-general's office) which such notice is to precede. Four weeks' notice of that is given by the first insertion in the paper, but the statute also requires that such notice shall be repeated once a week in each week. This conclusion is according to the current of authorities, as I understand them. I have consulted in this connection 4 Pet., 349; 16 How., 610; 6 T. B. Monroe, 70; 4 Littell, 78; 13 Sm. & Mar., 318; 55 Me., 190; 7 Ind., 169; 37 Miss., 567; and 5 Nev., 415, with the numerous authorities cited in the last case.

Upon the second point above, I have not been able to find any authority. There is weight in what has been forcibly and eloquently urged for the claimant to sustain his view of the question. Upon the facts found, however, I have not been able to satisfy myself that the statute has not been complied with. I think that, under the circumstances, the Santa Barbara Gazette sustains the character of a paper published

Central Branch Union Pacific Railroad.

at Santa Barbara. Although printed at San Francisco, it was forthwith transmitted to Santa Barbara for distribution and distributed there.

My answer to the four questions propounded at the close of your communication, therefore, are, respectively:

1. The Terrill survey is, under the circumstances, final and conclusive.

2. There was no legal authority for issuing the second patent.

3. If there were no such authority, the Commissioner had the power to recall a paper which was only in semblance a patent.

4. The patent of 1866 is the patent to be delivered to the confirmees.

In discussing this matter I have had the benefit of well-considered and very impressive arguments by counsel for the claimant, and I have thought of the case as one in which injury may have been done to the claimant under the doctrine of constructive notice.

Very respectfully and truly, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

Hon. C. DELANO,

Secretary of the Interior.

NOTE.—The Attorney-General, having been consulted in regard to the above case before his appointment to office, referred the communication of the Secretary of the Interior to the Solicitor-General on the 4th of January, 1873, to answer the questions propounded therein, and took no further action in the matter.

CENTRAL BRANCH UNION PACIFIC RAILROAD.

It is competent to the President, on the presentation for his approval (under section 9 of the act of July 1, 1862, chap. 120) of a map of the route of the contemplated extension of the Central Branch Union Pacific Railroad west of the meridian of Fort Riley, to make a provisional approval of the route solely for the purpose of withdrawing the lands from private entry along the same, without prejudice to his right of ultimately disapproving it; such a course would not at all commit him in regard to his final action upon the matter.

Central Branch Union Pacific Railroad.

DEPARTMENT OF JUSTICE,

March 17, 1873.

SIR: I have the honor of submitting the following reply to yours of the 15th instant, as to the Central Branch Union Pacific Railroad Company, addressed to the Attorney-General, and by him referred to me.

It seems to me that after a map has been presented to the President for approval, (under section 9 of Pacific Railroad act of July 1, 1862,) there is no way of preserving intact the *question* so presented during whatever time may be required for its solution, except by withdrawing, for such time, from private entry, &c., the lands as to which question is made. Similar action, as you know, is familiar to courts under the maxim, *Pendente lite, nihil innovetur*.

In order to preserve the claim of the Central Branch Company to a withdrawal of the lands on the route laid down in its map until the President shall have decided the question, I am of opinion that a provisional approval of such map, made *expressly for such purpose alone, and without prejudice to his right of disapproving it in the end*, would be proper, and would not at all commit him in regard to his final action thereupon.

I therefore answer in the affirmative the inquiry submitted in your communication above mentioned.

I am, very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

Hon. C. DELANO,

Secretary of the Interior.

NOTE.—The Attorney-General, previous to his appointment to office, had been employed as counsel in the above case by the railroad company, and for that reason took no official action thereon further than to refer the matter to the Solicitor-General with request to answer the question submitted by the Secretary of the Interior.

Guano Islands in the Pacific.

GUANO ISLANDS IN THE PACIFIC.

Claim of the widow of William H. Parker, under the acts of August 18, 1856, chap. 164, and April 2, 1872, chap. 81, to certain guano islands in the Pacific Ocean, examined, and the following conclusion reached: that claimant has no *derivative title* to the islands under her late husband, and that she is not now in a situation to set up an *original title* thereto in herself.

DEPARTMENT OF JUSTICE,
May 8, 1873.

SIR: In 1852 Mr. William H. Parker discovered several islands in the Pacific, which seemed to be barren rocks, and were, therefore, taken no account of by him until 1857, when, having heard of the guano-act of 1856, he bethought himself of them, and, hoping that they might be islands included in that legislation, began proceedings for securing its benefits. Not having possessed and occupied them, as required by that act, he was at that time in no situation to give the prescribed notice to the office of the Secretary of State. However, he professed to do so.

In January, 1858, he made an arrangement by which his supposed rights as to those islands were to be shared among the owners and charterers of the *Palastine*, a schooner, which thereupon sailed to those islands, having Mr. Parker, one of its charterers, on board, and "took possession" of them in the name of the United States, on behalf of such charterers and owners.

The *Palastine* made a second voyage thither in June, 1858, and, upon returning, left on the islands two men and other evidences of occupancy. This was the first time that any occupancy was provided for beyond the term of the stay of the vessel at the islands.

In the fall of 1858 the Pacific Guano Company was chartered by the State of California. It consisted of persons who were concerned in the voyage of the *Palastine*. Mr. Parker is not named in the act as a corporator, but it appears by papers on file in the office of the Secretary of State that he was an early, if not an original, stockholder. In those papers he appears as selling stock in that company, the sales

Guano Islands in the Pacific.

taking place at various times, and amounting, by November, 1858, when the last sale is recorded, to eighty shares.

About this time, apparently, some difference arose between him and the other parties as to the occupation, &c.; the grounds or nature of it do not appear. Mr. Parker was in Washington City upon business connected with this matter in the winter of 1858, and died here in February, 1859. After his death the Pacific Guano Company prosecuted the claim in the office of the Secretary of State, and in the fall of that year obtained a proclamation and filed a bond, as required by the act.

Among the papers on file in the office of the Secretary of State is one which is a declaration, dated December, 1858, that Mr. Parker had sold out all of his interest in the Pacific Guano Company, which declaration seems to be *ex parte*, and by the company itself or some of its members.

The act of 1856, as is admitted, gave no rights to the heirs or other representatives of a *discoverer* who should die while his rights were inchoate. So that Mr. Parker's interest, as before the Secretary of State, *died with him*. In April, 1872, an act was passed giving to the widows, heirs, &c., of *discoverers* whatever rights the deceased had at his death, *saving* such rights in other people as might have vested before its passage.

This whole question had been before the late Attorney-General Black in 1859, after Mr. Parker's death. (9 Opin., 364.) He considered Mr. Parker's rights as if devolved upon representatives or assignees, (and without appearing to know that he was dead,) and advised the Secretary of State that he never possessed any such rights in severalty, and that the Pacific Guano Company were entitled to claim the benefits of the act of 1856 as regards the islands under consideration. As is stated above, this advice was followed. Mr. Black's opinion is elaborate and commands respect by its reasoning. Besides, it is a precedent, and, according to well-established principles in this office, should be followed if not clearly wrong. I concur in its conclusions upon matters as they stood in August, 1859. The compound character required by the act of 1859, of one at once *discoverer*, *possessor*, and *occupant*, never was sustained by Mr. Parker in severalty. By his

Guano Islands in the Pacific.

own showing, the owners and charterers of the Palestine were the only persons qualified to avail themselves of the provisions of the guano-act. It is not to be doubted that the Pacific Guano Company was formed at their united instance, and especially that Mr. Parker was a member thereof, and exchanged his interests as an outsider for those of a corporator.

It is a separate and entirely satisfactory position that, when Mr. Parker died, his rights as an outsider perished, and, therefore, any other citizen was entitled to carry out the policy of the act of 1856 in regard to these islands. The members of the Pacific Guano Company had at least as much right to do so as anybody else. They did intervene, were recognized, and their rights *vested*. As *vested*, they are *saved* by the act of 1872.

It is said now, as new matter arisen since the case was before Mr. Black, that in the interval the Pacific Guano Company has forfeited its rights by abandonment and by other breaches of the conditions of the bond, &c. Upon application at the office of the Secretary of State I am told that it has been the course of that Department to recognize such islands only while occupied for the purposes of procuring guano, and, therefore, upon a cessation of such occupancy, they became open again to discovery, possession, &c. If this allegation of forfeiture be true, I suppose that the islands are again subject to *original* proceedings before the Secretary of State. In such event, Mrs. Parker will be obliged to take possession and occupy before she can be heard; and when that hearing comes on, the question of forfeiture may be contested by those who pretend to adversary interests.

I therefore conclude :

1. No person can now claim these islands through Mr. Parker.

2. There is not before me information upon which to pronounce that the rights acquired by the Pacific Guano Company have been forfeited.

3. Whoever, whether Mrs. Parker or any other citizen, wishes to test this theory of forfeiture must first act thereupon so far as to take possession and occupy for themselves.

Arkansas Bonds.

4. Mrs. Parker is not now in a condition to claim the intervention of the President.

Very respectfully, your obedient servant,
S. F. PHILLIPS,
Solicitor-General.

The PRESIDENT.

Approved May 9, 1873:

GEO. H. WILLIAMS.

ARKANSAS BONDS.

The act of December 13, 1872, chap. 2, does not require interest on overdue coupons of the bonds of the State of Arkansas, then held by the United States as Indian trust-funds, to be exacted by the Secretary of the Interior in the "arrangement" to be made by the State mentioned in the *proviso* of the 1st section of that act.

DEPARTMENT OF JUSTICE,
May 26, 1873.

SIR: You ask whether, in making "arrangement" under the act of December 13, 1872, which authorizes the "issuance of college-scrip to the State of Arkansas," &c., you are to exact interest upon the coupons attached to the bonds, (in number ninety, each for a thousand dollars, having coupons attached since July 1, 1842,) the State authorities insisting that the act will be complied with by including the *face* only of such bonds and coupons.

The words of the act which raise the question are, "some satisfactory arrangement by which the bonds of the State, principal and interest, now held, &c., shall be funded in new bonds authorized to be paid by said State for this purpose."

The decisions of the Supreme Court, that interest is due upon coupons when their "payment is unjustly neglected or refused," (7 Wallace, 82, &c.,) are based upon the view that such coupons are, of themselves, notes.

The act before us does not say, "bonds, *coupons*, and interest," as would be proper if interest upon the latter were required. The expression is, "bonds, *principal and interest*." It speaks of interest as an incident only to the principal of the bonds. It is only by treating overdue coupons as con-

Congressional Employés.

verted into principal, that interest is demandable upon them. If Congress had intended to make such demand here, it seem that in the above *specification*, which follows the word "bonds," it would have included *coupons*; that is, would not have omitted mention of that peculiar feature of these bonds that authorize interest upon interest. This seems the more probable, because the difference between the two modes of calculation for a period running back to 1842 is considerable.

Upon the whole, although the point is not clear, I conclude that Congress did not intend to demand interest upon the overdue coupons.

I have the honor to be, with great respect, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

Hon. C. DELANO,
Secretary of the Interior.

Approved May 26, 1873:

GEO. H. WILLIAMS.

CONGRESSIONAL EMPLOYÉS.

The provision of the act of March 3, 1873, chap. 226, increasing the pay of certain employés of the Senate and House of Representatives 15 per centum, does not apply to persons employed after the passage of that act; the increase of pay referred to is *pro hac vice* only, and not continuing.

DEPARTMENT OF JUSTICE,
July 9, 1873.

SIR: In reply to yours of the 3d instant, covering a note from the First Comptroller making inquiry whether the act of March 3, 1873, chap. 226, so far as it increases the pay of certain employés of the Senate and House of Representatives by 15 per centum (17 Stat., 487,) applies to persons *employed* after the passage of that act, I submit that it does not.

 Congressional Employés.

I need not remark upon the obvious informality with which the language employed to increase compensation has been inserted, as if by amendment, in the act. Although the act preserves, in general, the usual form of collecting the appropriations for the several departments under the respective heads, "legislative," "executive," "judicial," &c., yet all the changes *increasing* pay in all the departments are crowded together in one paragraph under "legislative," while at the same time provisions for such pay at previous rates remain in the parts of the act assigned to such departments respectively.

Perhaps the present question owes its existence to the urgency which prevented attention to the forms usual in previous acts of this kind. Upon consideration, however, its meaning upon the point in question is not doubtful.

The paragraph which contains the sentence referring to these employés, in previous parts had, among other things, provided for a prospective increase of pay for certain officers of the Senate and House of Representatives specifically. Thereupon follows such sentence, which commences with a provision that the increase previously given should be also *retrospective*, so as "to begin with the present Congress;" and then, after a semicolon, treats of the "pay of the present employés of the Senate and House of Representatives, * * * actually employed at the passage of this act, * * * whose pay has not been specifically increased by this act;" to these it gives an increase of pay "of fifteen per cent. of their present compensation on the amount actually received, and payable to them respectively from the beginning of the present Congress, or from the date of their appointment during the present Congress."

If, from the words of the second and final clause of a sentence, it be doubtful to what subject it refers, it is to be taken to refer to the subject of the former clause. Here, the former clause refers expressly, and exclusively, to the subject of *bonus* or back pay for certain officers in the acts specifically mentioned; it proceeds then to treat of officers, &c., not thus specifically mentioned, and makes provision for their increase of pay. Unless there be something to the contrary

Congressional Employés.

in the context, it will be presumed that this "pay" means back pay.

So far from there being anything "to the contrary" that is substantial, it seems to me that the context bears out the presumption. The persons spoken of are the "present employés," "and who shall actually be employed at the passage of this act." This language excludes persons subsequently *employed*. The pay given is a percentage upon the amount "actually received and payable" to the party applying, "from the beginning of the present Congress, or from the date of their appointment during the present Congress." That the amount so given should be graduated (within certain limits) to the length of time the employé had been in the service, shows that it is a bounty, personal to the applicant, and given once for all.

If the applicant were *employed* after the 3d of March, 1873, the amount actually received and payable to him from the beginning of the Forty-second Congress during such Congress is *naught*; and 15 per cent. upon that is no more. As appears above, in my view, the increase of pay mentioned in this clause is only *pro hac vice*, and not continuing.

It seems that, by its provisions, the occupant of a two-thousand-dollar office, who had held it from the beginning of the Forty-second Congress, receives an increase of \$600, while another occupant of an office of the same grade, who had held it for only one month, receives an increase of only \$25. It is hardly to be supposed that Congress designed that a change of this sort, arising out of a mere accident, should be *continuing*. Such legislation might be whimsical; while if confined to a single occasion, and to the then occupant, it would be reasonable.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

Hon. WM. A. RICHARDSON,

Secretary of the Treasury.

Approved July 11, 1873 :

GEO. H. WILLIAMS.

Claims for refunding Internal-Revenue Taxes.

CLAIMS FOR REFUNDING INTERNAL-REVENUE TAXES.

An application filed with the Commissioner of Internal Revenue for the refunding of taxes alleged to have been erroneously or illegally assessed and collected, though informal or defective, may nevertheless be regarded as a "claim" within the meaning of section 44 of the act of June 6, 1872, chap. 315, so far, at least, as to be the foundation for an *amendment*. Where the application is delivered to a collector or other local internal-revenue officer, it is not a presentation of the claim to the Commissioner such as is contemplated in the first *proviso* of that section.

DEPARTMENT OF JUSTICE,

July 15, 1873.

SIR: In reply to yours of the 7th instant, inclosing a communication of the 2d instant to yourself from the Commissioner of Internal Revenue, I submit the following opinion:

Whenever a *bona-fide* litigant or claimant brings his cause before a tribunal having jurisdiction, I apprehend that such proceeding, even when "fatally" *informal*, is usually held to be an action or claim, so far at least as to be a foundation for an amendment, and thus to be capable of becoming perfect by *relation* to its original institution, and so of defeating a plea of "limitation" (say) which, otherwise, might avail the defendant.

I think that this principle applies here to the first question put by the Commissioner; and, therefore, that such applications are "claims;" it remaining, nevertheless, matter of discretion with the Commissioner whether he will dismiss such claims because of gross informality; or will notify the claimant of the defect, and require amendment, within a reasonable time, upon pain of its dismissal; or will take any other course authorized by the practice of his Department.

I answer the second question by saying that such delivery to "a collector or other local officer" is not a presentation to the Commissioner. These local officers are not invested by law with the power of representing therein the Commissioner.

If the claimant transmit his claim through them he does so at his own option, and they therein become his agents. Of

 Printing.

course any delay or neglect thereabouts by them is *his* delay or neglect.

I am, with great respect, your obedient servant,
 S. F. PHILLIPS,
Solicitor-General.

Hon. WM. A. RICHARDSON,
Secretary of the Treasury.

Approved July 16, 1873:

GEO. H. WILLIAMS.

 PRINTING.

Section 10 (third *proviso*) of the act of March 2, 1867, chap. 167, does not require "printing" ordered by Executive Departments to be performed at such newspaper-offices only as are designated by the Clerk of the House of Representatives under section 7 of the same act.

DEPARTMENT OF JUSTICE,
 July 24, 1873.

SIR: In yours of the 19th instant you ask whether the 10th section of the act of March 2, 1867, (14 Stat., 467,) qualifies the 7th section of the same act, so that "job-printing executed at the instance of officers of the Army, and by authority of the War Department, in the Southern States, must be performed only at such newspaper-offices as the Clerk of the House designated under section 7."

I think not. Section 7 includes only "advertisements" ordered *for publication in said districts, i. e.,* ordered to be *published within* said districts. It intends no more than to specify, in cases where advertising has been or may be ordered to be made in some newspaper within a State, which that newspaper shall be.

Section 10 (3d *proviso*) applies to all "printing." It means that no printing "ordered," &c., shall be done otherwise than by the Government Printer, unless it be *impracticable* to have it done by him. No printing "ordered by the Executive Departments" can, under this proviso, read in connection with the 7th section, legally be executed by any one excepting the Government Printer, unless it be shown to have been *impracticable* for the latter to do it; provided that the adver-

South and North Alabama Railroad Company.

tisements specified in section 7, when ordered to be published in some newspaper within one of the States named, shall be made in the newspaper selected by the Clerk of the House of Representatives.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

Hon. WM. W. BELKNAP,
Secretary of War.

Approved July 24, 1873:

GEO. H. WILLIAMS.

SOUTH AND NORTH ALABAMA RAILROAD COMPANY.

The rights derived by the South and North Alabama Railroad Company under the act of March 3, 1871, chap. 123, reviving the land-grant act of June 3, 1856, chap. 41, in favor of that company, are subject to all vested interests which had already intervened in favor of the Alabama and Chattanooga Railroad Company under the act of April 10, 1869, chap. 24, reviving the same land-grant act in favor of the latter company.

Such a vested interest, at the date of the act of March 3, 1871, had already intervened in favor of the Alabama and Chattanooga Railroad Company as to the public lands lying at the point of intersection of the two roads, within the overlapping limits of the same; and hence these lands should (following the practice of the Interior Department in similar cases) be certified to the State in favor of the last-named company solely.

Seem, however, that under neither of the acts mentioned, including also the act of August 3, 1854, chap. 201, is a certificate required.

Review of the various land-grant acts with reference to the point just adverted to.

DEPARTMENT OF JUSTICE,
February 7, 1874.

SIR: Circumstances beyond my control delayed a reply to yours of the 13th of November last, (in relation to a petition by the South and North Alabama Railroad Company,) addressed to the Attorney-General, and by him, at that time, referred to me.

The statement of facts in your communication is, briefly, that by an act passed in 1856 (11 Stat., 16) certain lands were given by the United States to the State of Alabama for

South and North Alabama Railroad Company.

the purpose of aiding in the construction of several railroads therein named, among them the petitioner and another company which, for brevity, I will call the Chattanooga Company. By its terms, in a certain event the grant was to fail, and the lands were to revert to the United States. It is conceded that such event happened and that thereupon the lands reverted.

Afterward the act of 1869 (16 Stat., 45) revived *so much* of the grant of 1856 as concerned the Chattanooga Company, which thereupon performed all the conditions necessary to render its rights indefeasible; and subsequently to this action an act of 1871 (16 Stat., 580) revived *so much* of the grant of 1856 as concerned the petitioner.

As the lines of the above road intersect, and this event must have been contemplated by Congress, questions have arisen as to their respective interests in the grant as to lands lying about the point of interference.

Upon this matter, you submit two questions as to the respective rights of the companies named above: 1. Whether either, and which of them, is to be preferred; 2. Supposing they are both entitled, how the distribution is to be made.

The view which I take of the case renders it unnecessary to consider the second question.

However it may have been at one time, the respective claims of these companies have not at any time since their revival depended upon *cotemporaneous legislation*. When the act of 1869 conferred a new and inchoate right upon the Chattanooga Company, and also until that company by its subsequent action had converted that inchoate right into one that was indefeasible, there were in existence no rights, inchoate or other, in the petitioner.

It is true that the act of 1869 referred to the previous act of 1856 for the details of what it gave, and revived for the Chattanooga Company only *so much* as had been given previously. "So much" as the act of 1856 had given was such and such sections of land, qualified further by the fact that the petitioner had a contingent interest in the same grant, that upon certain action by it would *collide* with that of the Chattanooga Company, and so would modify it.

In 1869 the petitioner's interest had ceased, and so this qual-

South and North Alabama Railroad Company.

ification, this subjection to a springing interest in another, had also ceased. I cannot conceive that the act of 1869 revived any right of any sort in the petitioner; and it seems to me necessary to establish this in order to lay a basis for a conclusion that the respective titles of the two companies run back to a common origin. From 1866 to 1871 the rights of the petitioner were not *in esse*, and any subsequent *revival* of those rights was granted subject, of course, to all vested interests that had intervened since their *cesser*. Such a vested interest had intervened in behalf of the Chattanooga Company.

I therefore entirely concur in your opinion upon this question.

You ask whether the certificate for the lands which is to be sent from the Department of the Interior to the State of Alabama should be, in form, *to the State simply*, or *to the State for the benefit of a particular railroad, to aid which they are given*.

In the opinion given by yourself upon these questions, which accompanies the communication to this Department, it is said (Ms., p. 9) that *it has been the uniform practice in railroad-grants, from the time such grants were first made until the present, to certify them to the State for the use of the particular company found to have the best claim*.

Questions as to forms of business intercourse between the Departments and States, as it seems to me, are best decided by uniform practice in numerous cases, extending, as here, over more than twenty years. I therefore am of opinion that, of the two forms proposed, the latter is to be preferred.

The question submitted upon this point is special, and perhaps requires no other reply than the above. It is pertinent, however, to prevent misapprehension, for me to say, here, that in my view, under the act of 1854, (10 Stat., 346,) and those of 1856, 1869, and 1871, above, no certificate in any form is required.

My attention has been called to this point by arguments on the part of counsel who represent the petitioner.

Upon consideration, it seems that the act of 1856 did of itself convey a fee-simple to the State of Alabama. Its words, material here, are: "*Be it enacted, &c., That there be, and is hereby, granted to the State of Alabama, for the pur-*

South and North Alabama Railroad Company.

pose of aiding in the construction of railroads, [specifying them,] every alternate section of land designated by odd numbers for six sections in width on each side of each of said roads. * * * The lands hereby granted to said State shall be disposed of by said State only in manner following, that is to say, that a quantity of land not exceeding one hundred and twenty sections for each of said roads, and included within a continuous length of twenty miles of each of said roads, may be sold, and when the governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads are completed, then another quantity of land hereby granted, &c., may be sold, and so from time to time," &c.

No other provisions in the statute bear upon the point before us; those which require an *exclusive* application of the proceeds of such lands to the particular road to aid which they are given, bearing not upon the time at which the estate vests in the State, or upon the quantity of interest that so vests, but only upon the question whether the State takes a *beneficial* interest or merely one as *trustee*, which is of no importance in a discussion as to *whether it takes a fee by mere virtue of the statute or not*. There is here no attempted *repeal* of the statute, as in the case of *Rice vs. Railroad Company*, (1 Black, 368,) where the Supreme Court decided that the *repeal* there suggested was effective, because the statute repealed conferred no beneficial interest upon Minnesota.

I have, in this connection, looked over some forty statutes giving lands to States for railroads, canals, &c., or giving them to companies directly, passed in and since 1846, and found in the 9th, 10th, 11th, 13th, 14th, 15th, and 16th volumes of the Statutes at Large. Those statutes, as regards the point under discussion, fall into two distinct classes: 1, such as impose no duty upon any officer of the United States in connection with the reports required from the States as to the *progress* of the work aided; and, 2, those which do. In general, the earlier statutes are of the former class, and the later in date are of the second; marking, perhaps, an improvement in the details of such grants.

The earliest acts which I have cited are two in behalf of the Territories of Iowa and Wisconsin, (9 Stat., 77, 82,) whose

South and North Alabama Railroad Company.

admission as States was then progressing. The grants were to take effect upon their *admission*, the lands to be selected by the governor, and sales thereof to be made according to the progress of the work, as certified by the governor to the President. In this case, I apprehend that the fee-simple vested in the States, by the force of the act itself, upon the *admission*, and that no action was required of the President except that of receiving, and, perhaps, of transmitting to the proper office, the information given by the governor as to the *progress*. He was not to sanction or to verify such certificate, or to make independent inquiry as to the progress. Congress made the governor its agent to examine into such progress, and his report would not be questioned as an authority for further sales. If he has made a false report, it should have been a matter to be passed upon by Congress alone.

In 1850 an act was passed (9 Stat., 466) granting lands, for railroad purposes, to Illinois, Alabama, and Mississippi. They were to be disposed of as the work progressed; but no report or certificate or other communication was required to or from the States, or any officer of the United States.

In 1852 an act was passed (10 Stat., 9) granting lands, for railroad purposes, to Missouri. It is the first of a series having features nearly identical with that under consideration. It required a certificate of *progress* by the governor to the Secretary of the Interior, as authority for further sales. It required no action by the latter in connection with such certificate. Of course, it was implied that he would avail himself of the information, and file the paper which contained it; but he was not responsible for its truthfulness, or in any other way for what the State did with the lands, or with their proceeds.

In 10 Stat., 155, 11 Stat., 16, 17, 18, 20, 21, and 195, are to be found *acts* (that in 11 Stat., 17, being the one under consideration) which are substantially *copies* of the one last mentioned; and in 10 Stat., 35, 13 Stat., 519, 14 Stat., 30, 86, and 409, and 15 Stat., 169, 340, are seven others which, upon the point before us, come under the same principle.

In all of the above eighteen statutes, it seems that the only action in relation to the title to the lands (except what in

South and North Alabama Railroad Company.

some cases was required *to fix a float*, which of course is not relevant here) upon the part of the United States, was the passage of the act. I find myself unable to perceive in them any authority for any certificate, patent, or other writing, to proceed from any other agent of the United States in connection with that title. The act, and that alone, is the conveyance, and that conveys the fee.

There is, however, a class of statutes granting lands, most of which have been passed in and since 1865, which are in general only instructions to officers of the United States to execute title upon some future event specified therein.

One such act is that of 1854, (10 Stat., 302,) giving lands to Minnesota Territory for a railroad, in which, after words of absolute grant, it is said (in another section) "no title shall vest in said Territory, nor shall any patent issue until twenty miles of the road is completed," &c. This is the act that was before the Supreme Court in the case in Black's Reports cited above. It is unnecessary to draw attention to its striking difference from the act before us.

Then comes an act of 1865, (13 Stat., 520,) giving lands, for railroads, to Michigan. This provides that the lands granted shall be disposed of only as follows: "When the governor of the State of Michigan shall certify to the Secretary of the Interior that any ten consecutive miles upon the route of either of said roads is completed in a good and substantial manner as a first-class railroad, then the Secretary of the Interior shall cause a certificate or certificates to issue to said State for one hundred sections of land for the benefit and use of said company," &c., and so from time to time. Here we find what is not to be found in one of the statutes cited above, a direction to the Secretary of the Interior to *take action* upon receiving the governor's certificate, that is, to issue a counter-certificate, &c.

It is observable that this statute is an amendment to one of the statutes (11 Stat., 21) in the first class above. The manner in which it varies the provisions of the former act upon the point before us is striking. It is the first act in reference to railroad-grants containing such a direction to the Secretary that has met my eye, and it has given the rule thereupon as to almost all of such acts passed since.

The next act containing such grants (13 Stat., 256) is also

South and North Alabama Railroad Company.

a similar amendment to the one in the first class above, (11 Stat., 195,) requiring, however, the Secretary to issue *patents* instead of *certificates*.

Then follow, with like provisions, 14 Stat., 80, 83, 87, 95, 338, and 549, and 16 Stat., 94, besides the following statutes which grant lands directly to railroad companies: 14 Stat., 236, 239, 289, 294, and 16 Stat., 576 and 579.

It comports with the high respect I entertain for those whose opinions hereupon may differ from mine, for me to say that a perusal of the above legislation has made a very strong impression upon me, to the effect that it contains two distinct classes of statutes, in the former of which, for the purpose of vesting the fee in the lands granted, no act upon the part of any agent of the United States is contemplated other than the passing of the statute itself. In its later legislation (among which, as above, are two cases in which it has found within its power, and so has reformed upon this point, acts which belonged to the former class) Congress has changed, and probably improved upon, its earlier forms of giving. Very probably if its attention had been drawn in 1869 and 1871 to the details of the act of 1856 before us, it would also have reformed them to the same purpose. However, it has not.

I therefore agree with the conclusions expressed by Attorney-General Black in his opinion of June 7, 1857, addressed to your predecessor, Mr. Thompson, (9 Opin., 41,) and hold that the act of 1854 (10 Stat., 346) does not apply to the case under consideration.

The expression "that there be, and is hereby, granted to the State of Alabama" conveys, *prima facie*, a fee-simple, and there is no subsequent language in the statute to qualify this effect, at all events to qualify it beyond the successive conditions of certificates by the governor of the completion of sections of twenty continuous miles (after the first twenty) of such road; whereupon the power of disposition vests for such successive portions, by virtue of the statute alone, and without any acknowledgment by the Secretary of his receipt of such certificates, or of any other action of his whatever; just as in the case of acts giving lands to Territories *upon their admission as States*, and the numerous cases in the books

Rancho "Los Trigos."

where conveyances by deed or will become operative upon some event subsequent to the execution of the deed or the death of the testator. In this case, as to the lands for the first twenty miles, there is no suggestion of even such a postponement of the operation of the act.

I am not called upon in this connection to decide whether the statute conveys a fee-simple immediately, or upon condition, and successively as to successive parts of the land. All that is necessary is to say that the statute shows that in either case *Congress* has chosen to be the sole representative of the United States in making this transfer, and that all necessary limitations and clauses of such transfer are to be found in the statute alone.

With great respect, your obedient servant,
 S. F. PHILLIPS,
Solicitor-General.

Hon. C. DELANO,
Secretary of the Interior.

Approved February 18, 1874:

GEO. H. WILLIAMS.

RANCHO "LOS TRIGOS."

Private land-claim for the rancho "Los Trigos," in New Mexico, was confirmed (as No. 8) by the act of June 21, 1860, chap. 167, but which act made no provision for the issuing of a patent to the confirmees. The latter, however, contend that they are entitled to have a patent issued to them therefor, first, by virtue of the provisions of art. 8 of the treaty of Guadalupe Hidalgo, (9 Stat., 929;) and, second, by virtue of the provisions of section 2 of the act of March 3, 1869, chap. 152. *Held* that the treaty provisions referred to do not make it obligatory upon the Government to issue patents in such cases; but that, under the provisions of the act of March 3, 1869, the confirmees are entitled to a patent for the claim mentioned.

DEPARTMENT OF JUSTICE,
 February 21, 1874.

SIR: I have examined the question presented to you for decision by the appeal of the legal representatives of Francisco Frajillo, Diego Radillo, and Bartolomo Marquez from the decision of the Commissioner of the General Land-Office

Rancho "Los Trigos."

of April 1, 1873, refusing to issue to them a patent for the rancho known as "Los Trigos," in the Territory of New Mexico, confirmed as No. 8 by the act of Congress approved June 21, 1860, (12 Stat., 71.)

The act of confirmation does not provide for the issuing of a patent, and no claim for one is set up under it. It is insisted, however, that the preparation and delivery of such evidence of title is made obligatory upon the Government, first, by the provisions of article 8 of the treaty of Guadalupe Hidalgo, (9 Stat., 929;) and, second, by the provisions of the 2d section of the act of Congress approved March 3, 1869, (15 Stat., 342.)

That portion of the eighth article of the treaty material to the present investigation is as follows, viz:

"In the said territories property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States."

In my opinion, the plain meaning of this article is that all these non-resident Mexicans, their heirs and Mexican assigns, shall be forever protected in their property of all kinds in said territories, and shall enjoy, with respect to it, the same guarantees as shall be enjoyed by American citizens owning the same class of property. No discrimination shall be made in favor of Americans and against Mexicans, with respect to any kind of property. The same ample guarantees shall be extended to each. Neither shall be better protected than the other. But the appellants herein go further and insist that a Mexican owner of one class of property is entitled to guarantees equal, not to what an American would have in the same class, but to what an American is entitled in another and a different class; and that because an American, under the pre-emption or donation laws of the United States, is entitled to a patent for his claim, a Mexican is also entitled to a patent for a Mexican grant. This position is, in my opinion, utterly untenable, and is not justified either by the letter or the spirit of the treaty. Its effect might be to defeat the manifest object of the national compact, by rendering guar-

Rancho "Los Trigos."

antees to Mexicans and Americans unequal, with reference to this very class of property.

The peculiar phraseology of the treaty is such that the property-rights of an American are not to be measured by those of a Mexican, but *vice versa*.

Under the construction contended for, therefore, Mexicans could claim, by reason of American rights in certain other property, the right to patents for Mexican grants, while American purchasers of the same grants would be left without similar guarantees, being protected by neither treaty nor statute. Can it be seriously contended that this is the legal effect of the eighth article of the treaty?

The true criterion by which to determine the guarantee to be given a Mexican property-owner under the treaty is the guarantee which by the laws of the land is given to an American owner of the same class of property under the same circumstances. In my opinion, this and nothing more is required or justified by the language used. If American assigns of Mexican grantees are not by the laws of the United States entitled to patents for Mexican grants, then the Mexican grantees and their heirs and Mexican assigns are not so entitled under the treaty.

The 1st section of the act of March 3, 1869, confirms by number five private Mexican grants in the Territory of New Mexico. "Los Trigos" is not one of the number, having been previously confirmed by the act of June 21, 1860.

The 2d section of the act of 1869 is in the following words, viz:

"And be it further enacted, That the Commissioner of the General Land-Office shall, without unreasonable delay, cause the lands embraced in said several claims to be surveyed and platted at the proper expense of the claimants thereof; and, upon the filing of the said surveys and plats in his office, he shall issue patents for said lands in said Territory, which have heretofore been confirmed by acts of Congress and surveyed, and plats of such survey filed in his office as aforesaid, but for which no patents have heretofore been issued."

On the 6th day of September, 1870, your immediate predecessor, construing this section, in the case of the "Ortez Mine

Rancho "Los Trigos."

grant," then pending before him on appeal, and involving identically the same question presented by the appellants in the case under consideration, said: "I may without offense use the language of Attorney-General Bates in speaking of another act of Congress, and say that 'it bears the marks of haste and inconsideration.' Upon a careful examination I cannot believe that it was really intended to embrace all preceding claims that had been confirmed and surveyed."

On the 2d day of December, 1870, in the case of the "Baca Locations," then on appeal before you, the object of the appellants therein being to secure a reversal of your predecessor's decision in the "Ortez Mine grant" case, you say: "I am of opinion that said decision is not so manifestly improper as to justify me in overruling it. I feel less reluctance in coming to this conclusion from the fact that Congress will soon assemble. Their attention to the subject of surveys is invited by my predecessor in his annual report; and if his construction of the act does not give full effect to the intent and purpose of that body, the difficulty can and no doubt will be obviated by further legislation."

The case under consideration again presents the question as to the proper construction to be given to this section, and it is said, *in arguendo*, that this is the first occasion in which counsel have been heard in support of the position that patents should be issued on claims confirmed before the passage of the act.

If we are permitted to look at the report of the Committee on Private Land-Claims, who draughted and reported said act, and ascertain therefrom its meaning, the case will be free from difficulty; for that committee, (Mr. Orth, chairman,) among other things, said, (see Report No. 71, 40th Congress, 2d session, House of Representatives:)

"Accompanying this report is a bill, the passage of which we recommend, which provides for such confirmation, not by granting to the claimant a fee-simple estate in those lands, but simply by way of quit-claiming on the part of the United States to the heirs of the original grantees.

* * * The bill herewith reported also provides for the issuing of a patent in each case. It is not assumed that a patent is at all necessary in order to confer

Rancho "Los Trigos."

or confirm title in these cases, for we are aware that our Supreme Court has decided that confirmation by act of Congress and approved survey under it are sufficient evidence of title without any patent; but we believe it due to these claimants, whose original title-papers have heretofore been surrendered to the Government, that they should not be put to the trouble of providing each for himself or herself a copy of the treaty of Guadalupe Hidalgo, of the act of Congress of July, 1854, of the act confirming such title and the survey made under it, in order to feel assured that the land, which in some of these cases has been in possession of these claimants or their ancestors for one hundred years, is really their property.

"As American citizens, they are entitled to a simple evidence of title, and such as is given to our citizens who acquire real estate from the Government by the various modes provided by our laws. * * * In some of the acts heretofore passed, in reference to lands under said treaty with Mexico, patents have been required to be issued, while in others this has been overlooked; *hence we provide furthermore in this bill that in all cases in which confirmation has been had without the issuing of patents, such patents shall be issued, thus placing all claims under said treaty upon an equal basis.*"

The weight that should be given to the report of a committee draughting the act is scarcely in doubt, upon the authorities. As early as 1823, Attorney-General Wirt, in speaking of an act authorizing the settlement of the accounts and claims of the Vice-President, said "that the accounting-officers, in settling the accounts and claims of the Vice-President, *have a right to adopt the report of the committee as establishing the principles which are to govern them in the examination thereof*; for I consider the bill which accompanied the report as part of that report, and the passage of the bill into a law as a *virtual adoption of the report*, of which it was a mere consequence. * * * I do not think it would be proper on the part of the President, in the exercise of his revising power, to reject the principles established by the report of the committee, and to adopt others in conflict with them. Considering the report as I do, *in the light of a preamble to the law*, I think that its principles ought to be respected so far as they go." (1 Opin., 596.)

Rancho "Los Trigos."

In *Aldridge vs. Williams*, (3 How., 24,) Chief-Justice Taney, in speaking of an act of Congress, said: "In expounding this law, the judgment of the court cannot in any degree be influenced by the construction placed upon it by *individual members* of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both Houses, and the only mode in which that will is spoken is in the act itself, and we must gather their intention from the language then used, comparing it, where any ambiguity exists, with the law upon the same subject, and looking, if necessary, to the public history of the times in which it was passed." It will be observed that the learned Chief Justice was speaking of the opinions of *individual members* of Congress, and not of the committee having the matter in charge.

The Supreme Court, in the case of *The United States vs. Lynde*, (11 Wall., 632,) examined the report of the Committee on Private Land-Claims in the Senate upon the bill then under consideration, and were evidently influenced by it. Mr. Justice Bradley, in delivering the opinion of the court, said: "After the unsuccessful attempts made in the courts, as last referred to under the Missouri act of 1824, the subject was again brought to the attention of Congress in May, 1858. Mr. Benjamin, who had been counsel for the claimants in the last cases, made a report to the Senate, as chairman of the Committee on Private Land-Claims, and submitted a bill for the relief of the claimants. This report contained a very full history of the treaties and litigation, giving a favorable view of the Spanish side of the question. Suffice it to say, in consequence of this report Congress passed the act of June 22, 1860."

There is no intimation in this opinion that there was any impropriety in looking into the report of the committee with a view of ascertaining the meaning of the law in question; but, on the contrary, there is an implied recognition of its propriety. And why not? It is well known that the important legislation of Congress is mainly decided upon in the committee-room, and the unanimous report of the proper committee

Rancho "Los Trigos."

upon any measure is almost invariably a sure indication of its passage.

In the case now under consideration, I am of opinion that it is proper to look into the report of the committee accompanying the bill, for the purpose of aiding in giving construction to the somewhat ambiguous language used; and by so doing I find that the doubt is removed, and that it was intended to authorize the issuing of patents in all cases which had been confirmed by Congress and surveyed and plats filed in the office of the Commissioner of the General Land-Office, and for which no patents had issued before the passage of the act.

I think the same conclusion must be arrived at from the language of the act, viewed in the light of the then existing facts. The five private claims confirmed by the 1st section had not been surveyed or platted, and therefore the latter part of the 2d section, which speaks of claims "which have heretofore been confirmed by acts of Congress and surveyed, and plats of such survey filed in his office as aforesaid, but for which no patents have heretofore been issued," could not apply to them. There was no need of this clause if it was intended to issue patents for them only. Patents were provided by the first clause of the section, and it might have stopped at the words "he shall issue patents for said lands," and patents for the five claims would have been clearly and explicitly authorized. But the section does not stop here. It contains in addition thereto the following words: "in said Territory which have heretofore been confirmed by acts of Congress and surveyed, and plats of such survey filed in his office as aforesaid, but for which no patents have heretofore been issued." These words mean something. They were not used without some purpose. They are found in the act, and cannot be overlooked or thrust aside as mere surplusage. They must be given some intent. What shall it be? Manifestly, to my mind, that patents shall also issue for all other claims which had been theretofore confirmed by Congress and surveyed and platted, and for which patents had not issued.

This construction harmonizes with previous legislation on like subjects. (10 Stat., 599; 11 Stat., 374.) It gives force and effect to all the words used, and is in accordance with

Bids for Transporting the Mail.

the clearly-expressed understanding of the committee who reported the bill. I advise its adoption, and that a patent issue for the "Los Trigos" claim.

Very respectfully,

W. H. SMITH,
Assistant Attorney-General.

Hon. C. DELANO,
Secretary of the Interior.

I approve of the construction given in the foregoing opinion to the eighth article of the treaty of Guadalupe Hidalgo, (9 Stat., 929,) and also of the act of March 3, 1869, (15 Stat., 342.)

GEO. H. WILLIAMS.

February 23, 1874.

BIDS FOR TRANSPORTING THE MAIL.

A certified check drawn by a bidder, payable to the order of the person who at the time is Postmaster-General, but omitting any reference to his official position, does not meet the requirements of section 253 of the act of June 8, 1872, chap. 335; the official designation should accompany the name.

Where such check is drawn payable to the bidder or a third party, and by him indorsed payable to the order of the Postmaster-General, this is a sufficient compliance with said section.

A single check will not suffice for several persons bidding for distinct routes.

The substitution of bank-notes or other currency for a certified check, to accompany the bid, is inadmissible.

Quere, where a single certified check, less in amount than is required by the statute, accompanies the bids of one person for *two* or more routes, whether it may authorize a contract for any *one* of such routes if it be sufficient in amount for the same taken singly. The Attorney-General inclines to the opinion (differing herein from the view of the Solicitor-General) that the Postmaster-General may accept the check and award a contract in such case.

A check in the following form: "Pay to John A. J. Creswell, Postmaster-General, or order, nine hundred dollars, provided the bid of A. B. is accepted on route No. —, and he fails to enter into contract for the same; and in case bid is not accepted nor contract is made, check to be returned to drawer:" Held inadmissible, the proviso thereto invalidating it.

Bids for Transporting the Mail.

DEPARTMENT OF JUSTICE,
February 24, 1874.

SIR: The Attorney-General has referred to me your communication to him of the 17th instant, inclosing a note addressed to yourself by the Second Assistant Postmaster-General asking for an opinion upon certain questions of law therein contained.

I have considered the questions, and herewith submit a reply.

The case, in brief, is as follows: The Postal Code of June 8, 1872, section 253, provides "that hereafter all bidders upon every mail-route for the transportation of mails upon the same, when the annual compensation for the service on such route at the time exceeds the sum of five thousand dollars, shall accompany their bids with a certified check or draft, payable to the order of the Postmaster-General, upon some solvent national bank, which check or draft shall not be less than five per centum on the amount of the annual pay on said route at the time such bid is made, and in case of new service not less than five per centum of the amount of one year's pay proposed in such bid, if the bid exceed five thousand dollars per annum. In case any bidder, on being awarded any such contract, shall fail to execute the same with good and sufficient sureties, according to the terms on which such bid was made and accepted, and enter upon the performance of the service to the satisfaction of the Postmaster-General, such bidder shall forfeit the amount so deposited to the United States, and the same shall forthwith be paid into the Treasury for the use of the Post-Office Department; but if such contract shall be duly executed, and the service entered upon as aforesaid, such draft or check so deposited shall be returned to the bidder."

In the course of recent biddings for postal routes, the following variations from the letter of the above statute, as regards certified checks, have occurred, and have given rise to questions whether such variations are *material*:

1. The certified check is drawn payable to the order of John A. J. Creswell, omitting any reference to his official position.

Bids for Transporting the Mail.

2. Such check is drawn payable to the bidder or some third person, and by him is indorsed payable to the order of the Postmaster-General.

3. A single one of such checks accompanies the bids of several persons bidding for distinct routes.

4. The bid is accompanied with Treasury notes or other currency instead of a check.

5. A single certified check, less in amount than is required by the statute, accompanies the bids of one person for two or more routes; and a question is made, whether, if such check be sufficient in amount for one or more of such routes taken singly, it may authorize a contract for any one of such routes, and, if so, for which.

6. Such check is in form: "Pay to John A. J. Creswell, Postmaster-General, or order, nine hundred (900) dollars, provided the bid of A. B. is accepted on route No.—, and he fails to enter into contract for the same; and in case bid is not accepted nor contract is made, check to be returned to drawer."

7. The check is without an internal-revenue stamp.

In requiring a certified check as above, Congress intended to secure to the United States some reparation for the injury done to the public by the *failure* specified in the above section.

The method by which it pursues this object is in accordance with the general principles by which accountability for public money is enforced against such officers as are required by their official duty to receive it. The transaction is to show *upon its face* that the fund is in the custody of, and in one event is to belong to, the United States; that it is the official, and not the private, property of the officer in whose personal keeping it may be found. This will give notice to any indorsee of the draft that it is a trust-fund, and it will require of him to see that it has been transferred to him in accordance with the official duties of the indorser, and so will require the bank upon which it is drawn to see that its proceeds go to the use of the United States.

These guarantees do not exist in the case of a draft made payable to an officer by his proper name alone without allusion to his official character. Such draft may be passed to a

Bids for Transporting the Mail.

bona-fide purchaser without value, and so lost to the United States. In case of its indorsement and payment, the United States would be under the necessity of proving by extrinsic evidence its interest and that the indorsee had taken, or that the bank had paid, it with notice of such interest.

The difference in effect between the forms of the draft in the one case and in the other is, to use a quaint term common in this connection in the courts, that in the former the fund is *ear-marked*, in the latter it is not.

Although the distinction between what is *mandatory* and what is merely *directory* in statutes is one of frequent application among provisions that are matters of detail, it cannot well be said that a feature in an act of Congress requiring a draft to be made capable, upon its face, of identification as belonging to the public, is of the latter class.

With these preliminary remarks, I proceed to reply to each of the above questions in their order:

1. In my opinion the certified check drawn as in the first case above does not comply with the statute in an important particular; and this, not because the gentleman who holds the office of Postmaster-General might not himself indorse such check to the "Postmaster-General," or because he could not otherwise enforce it for the benefit of the United States, but because it gives him a control over the check and its proceeds not intended by the statute.

2. A certified check drawn payable to the bidder, or some third person, and by him indorsed payable to the order of the Postmaster-General, complies substantially with the requirements of the statute. It can make no difference to the holder of a certified check whether he takes it as payee or as indorsee; no equities can arise between the bank and any former holder so as to embarrass his claim. (See *Merchants' Bank vs. State Bank*, 10 Wall., 647, &c.)

3. A single check cannot be relied upon, by several persons bidding for distinct routes, as a compliance by each and all of them with the provisions of the above section. This is so plain as to need no discussion.

4. The case stated here is open to all the objections considered in the outset of this discussion. I therefore think

Bids for Transporting the Mail.

that the substitution of bank-notes or other currency for a certified check is inadmissible.

5. It seems to me that the transaction stated under this head is plainly invalid, and that even where such check is sufficient in amount it might lead to troublesome and injurious complications that are avoided by the form authorized in the statute. For instance, in this case as well as in the third above, there could frequently be only an approximate compliance with the provisions of the statute for a *forfeiture of the amount* or a *return of the check*.

6. It is enough to say that the proviso attached to this check does not pursue the forms of the parallel provisions in the statute. It, therefore, invalidates the check.

7. The stamp-act renders *invalid* checks that have been issued unstamped, only in case they be so issued "with *intent*" to evade the provisions of that act. (*Campbell vs. Wilcox*, 14 Wall., 431.) It also renders unstamped paper "inadmissible in evidence," without reference to *intent*.

The certified checks in question in the case in 10 Wallace, 647, cited above, bore the ordinary two-cent stamp, and therefore the court, while calling attention to the provision taxing these instruments specifically as part of the *currency* of banks, as a reason for exempting them from certain stamps that had not been affixed, did not discuss the question here presented. It may be doubtful whether the specific tax upon them as *currency* be not all for which they are liable.

It seems questionable, also, whether the fraudulent *intent* required above may well be imputed in a case where a check has never been negotiated previously to its application to the purposes required (as above) by the Postal Code; especially as the act probably requires for such invalidity that the intent should be participated in by *both parties* to the transaction. Still, if this were all that could be said, it might be well to apply the ordinary rule that public officers could not approve of contracts with the United States that are not, in point of form, beyond all reasonable question.

In case, however, the check be, as above supposed, one sought to be negotiated first at the time of its tender to the Postmaster-General, that is the time at which it is first required to be stamped; (act of 1864, § 151, 13 Stat., 292;

 Portage Land-Grant.

Comp., &c., 112;) and any delay occasioned by the deliberation of the Postmaster-General over its reception will not affect the question.

Even where the check had been in circulation before being offered to the Postmaster-General, by the second proviso to § 155 of the act of 1864, as amended by the act of July 14, 1870, (16 Stat. 257; Comp., &c., 115,) *any party having an interest therein* may, pursuing certain forms there prescribed, affix a stamp on paying to the collector a penalty of five dollars. The collector there mentioned is probably the collector of the district in which the paper was first negotiated.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

The POSTMASTER-GENERAL.

DEPARTMENT OF JUSTICE,

February 25, 1874.

I disapprove of that part of the Solicitor-General's answer to the fifth question which suggests the invalidity of a check presented by one who bids upon two or more routes where the amount of the check is sufficient to meet the requirements of the statute: first, because no question of that kind was submitted to me by the Postmaster-General; and, in the second place, if it was I should be inclined to hold that the Postmaster-General ought not to decline to accept the check, as the risk of loss would be wholly upon the bidder, and no prejudice that I can see would be worked to the United States; otherwise I approve the foregoing opinion.

GEO. H. WILLIAMS.

 PORTAGE LAND-GRANT.

Under the Michigan land-grant act of July 3, 1866, chap. 161, in aid of the construction of a ship-canal at Portage Lake, &c., the lands to be selected by the State are not required to be those "nearest" the contemplated line of that improvement, as in the prior land-grant made to the same State by the act of March 3, 1865, chap. 102.

The right of selection under the former act being only a "float," it could not be *adverse* to the right of any one who, while it remained in that condition, had acquired a legal or equitable right to any specific tract subject, in a general way, to such float.

Portage Land-Grant.

Where certain lands were withdrawn to supply said land-grants, as to a part of which lands the Commissioner of the General Land-Office afterward ordered notice to be given, by advertisement, restoring the same to private entry, and, pending the advertisement, erroneously instructed the register and receiver that certain other lands were included in such notice, in accordance with which instruction the latter were offered at private sale by the register and receiver, and were thereupon entered and paid for by S. and W.: *Held* that these facts are sufficient to give the board of adjudication of suspended entries jurisdiction of the claim of S. and W. to a patent for the land entered by them, and that if, upon investigation, the board should find that due publicity had been given to the fact of restoration, it might disregard the forms (though adopted inadvertently) by which that publicity was attained.

DEPARTMENT OF JUSTICE,

March 11, 1874.

SIR: Your communication of the 27th ultimo, addressed to the Attorney-General, and by him referred to me, submits for consideration the following statement and questions:

"Congress, by act of March 3, 1865, (13 Stat., 519,) granted to the State of Michigan two hundred thousand acres of land for the purpose of aiding in constructing a breakwater, harbor, and ship-canal upon the neck of land on Lake Superior known as 'The Portage.' Said lands were to be selected by the agent of the State, subject to the approval of the Secretary of the Interior, from any lands in the upper peninsula of said State subject to private entry, and from alternate and odd-numbered sections *nearest* said canal, and to which no right of pre-emption or homestead had attached.

"By the act of July 3, 1866, (14 Stat., 81,) Congress, in addition to the above-recited grant, gave to the State of Michigan, for the purpose of constructing said canal, two hundred thousand acres of land in the upper peninsula of said State, to which no homestead or pre-emption right had attached, one hundred and fifty thousand of which were to be selected from alternate odd-numbered sections, and fifty thousand from even-numbered sections.

"No provision was made in this act that the lands thus granted should be selected from lands *nearest* the canal, or from those *subject to private entry*.

"To satisfy these grants, all the vacant odd-numbered sections in said peninsula west of the line dividing ranges 15

Portage Land-Grant.

and 16 west were properly withdrawn by the Commissioner of the General Land-Office.

"On the 12th of April, 1871, the Commissioner ordered that all of said lands lying north of the line between townships 40 and 41 north, and west of the line dividing ranges 15 and 16 west, should be restored to market by public notice, to be published thirty days in certain newspapers. Such notice was duly given, and the time expired on the 5th day of June, 1871. After the notice had been published in part, and on the 12th day of May, 1871, the register and receiver of the district in which the lands were located addressed a letter to the Commissioner of the General Land-Office making some inquiry as to the limits of the lands to be restored. To this the Commissioner replied, on the 26th of May, 1871, that the lands colored yellow in the diagram inclosed in his letter were the lands to be restored by said notice.

"This diagram, through the mistake of the clerk who prepared the same, included certain lands in said peninsula which had been withdrawn, and which were south of the line between townships 40 and 41 north, and west of the line dividing ranges 15 and 16 west, and which lands were not included in the published notice of restoration.

"After the notice had been published the thirty days required, and during the months of June and July, 1871, Henry Whitbeck and Jesse Spaulding made private entry, at \$1.25 per acre, of something over nine thousand acres of the lands colored yellow in the diagram, and lying south of the line between townships 40 and 41 north.

"In making these entries they acted in good faith, and were advised by the register and receiver that they could properly be made. The lands so entered are valuable pine-timbered lands. There are vacant public lands sufficient to satisfy the grants made by the acts of March 3, 1865, and July 3, 1866, nearer the said canal than the lands entered by said Whitbeck and Spaulding.

"The Commissioner of the General Land-Office canceled the entries, and pending an appeal from his decision to this Department the State of Michigan made application to select the lands covered by the entries, in part satisfaction of the grant of July 3, 1866.

Portage Land-Grant.

"Upon the foregoing facts, I desire to present for your consideration and answer the following questions:

"1. Is the State of Michigan required to select lands to satisfy the additional grant of July 3, 1866, from those nearest the said canal?

"2. If it is not, is the right of the State to the lands entered by Whitbeck and Spaulding such an adverse claim as should prevent the confirmation of said entries by the board referred to in the next question, assuming that the case is otherwise such as could be confirmed?

"3. Are the facts hereinbefore stated sufficient to justify the board created by the acts of August 3, 1846, (9 Stat., 51,) and June 26, 1856, (11 Stat., 22,) in confirming the said entries of Whitbeck and Spaulding?"

To the questions above proposed I reply *seriatim* as follows:

I. It is very doubtful whether a court can see its way to such a construction of the act of 1866, above cited, as will render the land-grant therein contained subject to the condition expressed in that of 1865, also above cited, by which the lands to be *selected* are to be those "nearest" the contemplated line of the canal. The question, what was the intention of Congress in any particular legislation, can be solved in general only by reference to the words which Congress has used therein. The act of 1866 is brief and plain, as is also that of 1865. The former employs some of the terms used in the act of 1865, to characterize the lands given. Some of them it omits. Nothing occurs to me sufficient to show that the omission was not deliberate. It is true that this act is herein a departure from the system of legislation in regard to land-grants, which is based upon what has been called the principle of *prudent proprietorship*, and, therefore, includes alternate sections only and those of lands nearest the improvement in aid of which they are given. This act varies from this system in both particulars. It allows of a selection of *every section* for one hundred of those given, and omits a clause usual in such legislation confining the selection to the neighborhood of the line of the canal.

Although there may be enough in the case to excite a scruple, I know of no rule which, where the language is as plain as

Portage Land-Grant.

that of the act of 1866, would justify a tribunal in refusing to give effect to the particular intentions of Congress as *expressed in the words that have been used*.

I submit, however, that it is unnecessary to give a categorical answer to the first question ; because, even supposing the Portage Company unlimited in its selection of lands, still, under the other circumstances of this case, the claim of Messrs. Spaulding and Whitbeck is older and superior.

I wish to say here that I do not understand the second and third questions as asking of this Department a determination of any matter which will properly arise before the board when this claim comes before them, excepting that of jurisdiction. I understand those questions to go no further than to inquire whether the jurisdiction of the board can be maintained over a case having the general features of this one, either because of its nature, or because of the adverse claim of the Portage Company, leaving all matter as to the merits to be decided by the board.

II. Supposing the act of 1866 to give to the Portage Company a right to select the lands in controversy as being within the grant to the State of Michigan for their benefit, that right was only a *float*, and could not be *adverse* to the right of any one who, while it remained in that condition, had acquired a legal or equitable right to any specific tract subject, in a general way, to such *float*. This principle has been established in many cases decided by the Supreme Court of the United States. (*Fremont vs. United States*, 17 How., 553, and *Railroad vs. Fremont County*, 9 Wall., 89, &c.)

These decisions make it plain that so long as a land-grant remains a mere *float* it is liable to be defeated in part or all by entries of tracts within its general boundaries.

III. The facts bearing upon the third question are, that this is land which, before its withdrawal, was liable to private entry ; that it was withdrawn to supply certain land-grants ; and that in 1871 the Commissioner of the General Land-Office ordered notice to be given by advertisement for thirty days (in accordance with the standing regulations of such office) restoring to private entry the larger part of such lands, but by such metes and bounds as excepted the land in controversy ; however, pending such advertisement, in the

Portage Land-Grant.

course of an official correspondence upon the subject with the register and receiver, he instructed the latter that this land was included in such notice. In accordance with such instructions, it was offered at private sale by the register and receiver, and thereupon the claimants entered it and paid its price.

I observe what is said as to the *mistake of the clerk* in making the map referred to in the above instructions to the register and receiver. What is material in this respect is that the mistake was as to a matter within the discretion of the Commissioner, and that these claimants, who are admitted to have acted in good faith, had no knowledge or any means of knowing that the action was by mistake. To them, and to all the world outside of the Land-Office, the letter and map were the act of the Commissioner alone.

If the mistake had been discovered and announced before any stranger had acted upon it, it might have been corrected; but there is no place for correction after a stranger has been told of the *instruction*, and, acting upon it, makes an investment accordingly. In such cases, so far as is necessary to fortify the title of the purchaser, courts will allow of no suggestion of mistake, but will assume that the action of the seller was deliberate.

This is elementary law as between man and man. If the land so entered were the private property of the Commissioner, he would be bound to make his instructions good, no matter how the mistake originated. But the question here is, how far such erroneous *instruction* by a public officer can affect property belonging to the United States. In general, no mistake of public officials can have an effect other than personal to themselves. But if the mistake were one as to a matter over which they had entire discretion, I apprehend that it would be otherwise. If, for instance, the Commissioner had entire control over the form of the *notice of instruction*, and inadvertently gave it in one form rather than in another, whereupon parties acted upon what he said, and in good faith made entries and paid money, it seems to me that very high equities, if not legal interests, as against the public might in this way be originated.

The form of notice is one provided for by regulations

Portage Land-Grant.

made heretofore by the Commissioner. As he made them, he can alter them or dispense with them. (*Lytle vs. Arkansas*, 9 How., 314.)

I bear in mind and quite agree to what has been said in this Department heretofore by Messrs. Crittenden, Butler, and Legare, as to the propriety of *publicity* of notice of withdrawal as affording a fair opportunity to all citizens of participating in the purchase. (3 Opin., 274, 650; 4 Opin., 167.) This is one of those circumstances which will be brought before the board in making out a case on merits. They will judge whether this *bona-fide* purchase was made under circumstances where the requisition of publicity of notice of the *restoration* was substantially complied with. What I say here is only that whether due publicity is obtained by this or that form of notice is a matter within the discretion of the Commissioner; and the end being substantially attained, a mistake as to the means of obtaining it cannot be set up as a ground for disappointing one who had no reason for suspecting the existence of the mistake. A disregard of such formalities in transactions as are unessential is what gives rise to a large class of equities; and the present being a case in which the claimants are met by a regulation which herein has been disregarded by the officer who made it, I am of opinion that the board have jurisdiction of the claim, and that if, upon investigation, they shall consider that due publicity had been given to the fact of *restoration*, it would be their duty to disregard the forms by which that publicity was attained and the fact that such forms were adopted inadvertently, and give judgment for the claimant.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

The SECRETARY OF THE INTERIOR.

Approved March 12, 1874:

GEO. H. WILLIAMS.

Tax upon "Surplus or Contingent Funds."

TAX UPON "SURPLUS OR CONTINGENT FUNDS."

Under the internal-revenue act of June 30, 1864, chapter 173, section 120, money earned and received by a bank during any one of the four years beginning with April 1, 1864, and added to its surplus or contingent funds, either actually (*i. e.*, at periods having intervals of less than six months) or by construction of law, (*i. e.*, once in six months,) remained liable to the five-per-centum tax imposed by said section, notwithstanding that subsequently an equivalent amount of money was stolen from the bank by one of its officers.

But where the money earned and received was stolen and lost, either before having been actually added to the surplus, or before the expiration of the six months, the case is one entitled to relief.

DEPARTMENT OF JUSTICE,

March 13, 1874.

SIR: Herewith I submit a reply to yours of the 19th ultimo, inclosing an application of the Hide and Leather Bank of Boston for the return of certain taxes, addressed to the Attorney-General, and by him referred to me.

In that note you ask the following question: "Was a sum of money earned and received by a bank during any one of the years above mentioned, [1864-1868 inclusive,] and subsequently stolen therefrom by one of its officers, liable to the tax imposed by section 120 of the internal-revenue law of June 30, 1864, *on all undistributed sums made or added during the year to the surplus or contingent funds*, either as the law was originally enacted, (13 Stat., 283,) or as it was modified in 1866, (14 Stat., 188)?"

I have read the papers transmitted by you for the "better understanding of the point at issue," but as they do not substantially vary from the short statement of facts in the question, I shall not make further use of them, except to say that they present a claim for repayment of taxes paid upon "an amount carried to a surplus or contingent fund."

Taxation of "surplus or contingent funds" during the time of this transaction was regulated by the act of 1864, chap. 173, (13 Stat., 283, § 120,) which levied a tax of *five per centum upon all sums made or added by banks, &c., during the year to their surplus or contingent funds*; and (§ 121) required such addition to be made *as often as once in each six months*. Sub-

Tax upon "Surplus or Contingent Funds."

sequent legislation, (14 Stat., 138,) made no change herein that is of importance to the matter before us.

The words of the statute evidently contemplate periodical action by the authorities of the bank, in the course of which, after a consideration of its affairs, it is determined to add a part of the earnings to the surplus or contingent fund; and where earnings exist they require such action to be taken at least once in six months. Whenever such additions are, or should be, made, *i. e.*, at least once in six months, they become the subject of taxation. That like amounts are afterward necessarily subtracted from such funds because of subsequent losses, cannot annul a tax due because of the prior incident, *viz*, the addition. Immediately after such addition, actual or imputed, the liability to taxation becomes fixed. Fluctuations in the business of the bank short of six months' duration, when unaccompanied by actual *addition* as above, are not taken notice of for the purposes of taxation.

The question of liability does not depend upon the *cause* for making subtractions. An *addition* is fixed, with liability, even although neutralized by a subsequent subtraction, no less when the latter is occasioned by embezzlement than when by, say, the failure of an investment. If, however, the addition and subtraction were both merely *entries*, (there not having been in fact at the time any ground of earnings to justify the *addition*, and the subsequent *subtraction* being intended merely as the correction of an *error*,) I think it clear that no tax was ever due.

The above question follows the papers in this case in speaking of the time of the *theft*, instead of that of the *loss*. It may be important to observe that these terms are not necessarily convertible. If the party embezzling, or his *bond*, were at the time of misplacement *good* for the amount misplaced, the United States would not return a tax paid in ignorance of such misplacement, merely because the deficit in the accounts of the officer had not then been adjusted. The time when such officer became insolvent is the time, and the extent to which he so became is the measure, of the *loss*; and, therefore, of the *subtraction*. An embezzling cashier is none the less a debtor of the bank whose money he has taken, and in a mere matter of account it seems that he is to be treated *entirely* as

Portage Land-Grant.

a *debtor*; and, therefore, in that connection it is more important to know whether he or his bond be solvent than whether he be dishonest. I suppose that the question implies a *loss*, upon the principle stated above, as *contemporaneous* with the embezzlement.

My reply to the question stated above is, therefore, as follows: Money earned and received by a bank during any one of the four years beginning with April 1, 1864, and *added* to its surplus or contingent fund, either actually (*i. e.*, at periods having intervals of less than six months) or by construction of law, (*i. e.*, once in six months,) remained liable to taxation under the act of 1864, notwithstanding that subsequently money to the same amount was stolen from it by one of its officers. If the case be one in which the money earned and received was stolen, and contemporaneously lost, either before having been *actually added* to the surplus or before the expiration of the period of six months, it is one entitled to relief.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved March 16, 1874 :

GEO. H. WILLIAMS.

PORTAGE LAND-GRANT.

Reconsideration of the subject of the Portage land-grant, heretofore examined in opinion of March 11, 1874, (see *ante* p. 637,) upon an amended statement of facts, and questions thereon, subsequently submitted to the Attorney-General.

View expressed in that opinion that the lands to be selected by the State of Michigan under the act of July 3, 1866, chap. 161, are not required to be those "nearest" the contemplated line of improvement, re-affirmed.

Selections of lands by the State under that act are subject to the approval of the Secretary of the Interior.

Authority of the Secretary to reject certain selections of the State, and re-instate certain entries of the same lands previously made by private parties, considered.

Portage Land-Grant.

Semble that notice of restoration of land to private entry, after having been once withdrawn therefrom, is not necessary (as assumed in the former opinion) to enable the board of adjudication of suspended land-entries to take jurisdiction of a private entry on such land and confirm it.

DEPARTMENT OF JUSTICE,

April 4, 1874.

SIR: Yours of the 24th ultimo, in reference to the Portage Canal Company land-grant, addressed to the Attorney-General, amends the statement contained in your communication of the 27th of February last in the following points:

1. When Spaulding and Whitbeck made their entries, they knew that the printed notice did not include these lands.

2. The action of the Commissioner of the General Land-Office, in canceling the entries of Spaulding and Whitbeck, is *not* now pending upon appeal to the Secretary of the Interior. That action was confirmed by the Secretary in September, 1872, and the entries have been canceled on the books of the general and local land-offices, and have not been reinstated. After such cancellation was completed, the canal company, still asserting its claim, had its selection, (including the lands previously covered by the Whitbeck and Spaulding entries,) certified by the local land-officers, noted upon the books of the local land-office, and reported to the General Land-Office, where they are now of record, uncanceled, and before the Office for consideration and action on the claim of the canal company; but Whitbeck and Spaulding have applied for a rehearing in the matter of the decision canceling their entries, and this application is pending.

Upon this statement, as amended, you submit the following questions:

"1st. Is the State of Michigan required to select lands to satisfy the additional grant of July 3, 1866, from those nearest the said canal?

"2d. If it is not, is the selection of lands other than those nearest the canal subject to the approval or disapproval of the Secretary of the Interior, and will the facts and circumstances of this case justify him in rejecting the selections of the canal company, so far as they conflict with Whitbeck and Spaulding's claim, with a view to the re-instatement of

Portage Land-Grant.

their entries and their submission to the board hereinafter referred to?

"3d. If the State is not limited to the lands nearest the canal, and if the Secretary has not the power to reject the selections aforesaid, is the State such a claimant, or is the right of the State to the lands entered by Whitbeck and Spaulding such an adverse claim, as should prevent the confirmation of said entries by the board referred to in the next question, assuming that the case is otherwise such as could be confirmed?

"4th. Are the facts hereinbefore stated sufficient to justify the board created by the acts of August 3, 1846, (9 Stat., 51,) and June 26, 1856, (11 Stat., 22,) in confirming the said entries of Whitbeck and Spaulding, and had the law in relation to the restoration of said lands been substantially complied with?"

I. I have considered this question more closely than at the time of my communication of the 11th ultimo, but with the same conclusion.

I admit the existence of the rule "*in pari materia*," and question only the measure of its application to the statute before us, that of 1866. If there were a general statute providing that all donations of land for works of internal improvement should be confined to such as are *nearest* to the work to aid which they are given, the omission of such provision in donations by a particular statute would, of course, be unimportant. Even if the case before us were one in which all other statutes making donations for like purposes manifested a policy of confining the donation to lands "*nearest*" its work, while the statute under consideration omitted all qualifications of that sort, it would be a matter of doubt whether it should not be read as *implying* as much. The exact case is, however, in the first place, that previous statutes of this sort, while requiring almost without exception that the land given shall be taken in one degree or other of vicinage to the work in contemplation, are by no means agreed that they are to be such as are "*nearest*;" *next* that a previous act in relation to the canal in question confined the selection to such lands as are "*nearest*" to it; *then*, that the present act contains no other provision upon this point

Portage Land-Grant.

except that the lands shall be within the "upper peninsula." If there were no other acts on the subject of such donations than the two in relation to this canal, it seems to me plain that the omission of the word "nearest" in the second would be regarded as *intentional*. There is nothing upon the face of the second act to indicate that such omission was *inadvertent*. If there were an absence of *detail* in its description of the lands given, there would be much better ground for referring for them to the previous act. But it seems herein to rely on itself for details, *i. e.*, to give its own details. If so, what it omits is as significant as what it retains.

I will not further dwell upon the reasons which prevail with me to say, that the Portage Company is not required to take the additional two hundred thousand acres given by the act of 1866 from such lands as are "nearest" to its canal.

II. The act of 1865, which confined the *selection* of the lands given to a narrow range, specifies *details* for this proceeding; that of 1866, in which the range of selection is much more indefinite, gives none. I think this furnishes an apt illustration of the class of questions in which interpretation is to be gathered from an act *in pari materia*. The first proviso of the act of 1866 declares that the lands are to be "selected." The act does not expressly enact that they shall be selected, but, as it were, refers to their selection casually in a proviso bearing on this subject. As to the manner of such selection the statute is upon its face "doubtful;" and this lets in the act of 1865 as being *in pari materia*. (Sedg., &c., 247.) Here Congress says, in effect, for details see former statutes; while as regards the former point, that of specifying the lands subject to selection, it gave details itself.

I therefore think that the act of 1866 plainly indicates that the additional lands are to be taken by selection made by an agent of the governor of Michigan, subject to the approval of the Secretary of the Interior; for effectual selection involves not only the judgment of the former but that of the latter as well.

Whether the Secretary can be justified in rejecting the selections of the canal company, so far as in conflict with Whitbeck and Spaulding's claim, with a view of re-instating the latter and submitting it to the board, depends, I think, upon

Portage Land-Grant.

whether Whitbeck and Spaulding *abandoned* their claim after the cancellation of their entries. If, after notification of such cancellation, the purchase-money was repaid and they actually or virtually abandoned their claim, then, as seems to me, the way was entirely open to the canal company, and entries made by it in such case should be referred to a claim set up *de novo* by Whitbeck and Spaulding. A cancellation by the Secretary, communicated to the persons who made the entry, and acquiesced in by them by receipt of the purchase-money, &c., would rescind the contract, and of course put an end to all equities as fully as to all legal claims for its completion.

If, however, the partial rescission of the contract by such cancellation were not assented to as above by Whitbeck and Spaulding, and they, ever since it was made, have been insisting upon their claims, I apprehend that the Secretary will be justified in restricting the selections by the canal company, and re-instating the case of Whitbeck and Spaulding for further consideration as a case pending before him constantly since 1872.

III. I do not read the act of 1846 as *excluding* jurisdiction where there is an "adverse claim," but as *conferring* jurisdiction where there is *no* adverse *as well as* where the rights of no other claimants will be prejudiced. I am not called upon to say when such rights will be prejudiced; for, in case the Secretary re-instates Whitbeck and Spaulding's claim, it will be a case of "suspended entries," and therefore included within the first act on this subject, which expressly provides that in such cases the rights of conflicting claimants shall not be prejudiced by the decision. This provision is expressly revived in the act of 1856. I am, therefore, of opinion that there is nothing in the fact that the canal company has made entries as aforesaid to prevent the board from confirming the entries of Whitbeck and Spaulding.

IV. In my former opinion I gave reasons for concluding that, if the board, upon investigation, should find that a reasonably fair notice, although not for *thirty* days or by advertisement in a newspaper, had been given to the public of the *restoration* of the lands in question to private entry, then

Portage Land-Grant.

the case is one of a substantial compliance with the law, and the entries of Whitbeck and Spaulding should be confirmed.

Upon subsequent investigation I am inclined to doubt whether even such a notice is necessary. The 11th rule promulgated by the board, upon the 3d of October, 1846, is, as I presume, still in force; at least there is nothing in the acts of 1853 and 1856 to annul it. It requires the Commissioner of the General Land-Office to recognize as valid "all private sales of tracts which had not been previously offered at public sale, but where the entry appears to have been permitted by the land-officers under the impression that the land was liable to private entry, and there is no reason to presume fraud, or to believe that the purchase was made otherwise than in good faith." (1 Lester, 483.)

That provides for a stronger case than one like the present, where the lands had once been subject to private entry, had then been withdrawn, with the subsequent circumstances in your letter detailed.

Upon page 486 of the same book is an opinion of Mr. Secretary Thompson to the effect that a case of entry of lands at the time withdrawn, allowed *by mistake*, is one within the jurisdiction of the board. He says nothing of the necessity of a *general impression* that the lands in question could be entered.

Nothing occurs to me to show that the regulation above quoted is not in force. If it be, I answer, without condition, that the facts stated in your communication are sufficient to justify the Commissioner or the board in confirming the entries of Whitbeck and Spaulding when re-instated as supposed in a former question.

I will add that there is nothing in the fact that Whitbeck and Spaulding knew that there was a discrepancy between the advertisement and the letter to vary their rights; for that is not a case of knowledge that the action of the office by the letter was variant from the provisions of a statute upon the subject of notice, but of knowledge that in the particular instance the office was not pursuing one of its own regulations, *as it had the power to do*. The existence of such knowledge does not render their mistake an unreasonable one.

Contracts for Carrying the Mail.

Upon the whole, I answer the first and third questions in the negative; the second and fourth in the affirmative.

With great respect, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

The SECRETARY OF THE INTERIOR.

Approved April 7, 1874:

GEO. H. WILLIAMS.

CONTRACTS FOR CARRYING THE MAIL.

The act of June 8, 1872, chap. 335, furnishes the exclusive rule for determining what mail contracts do, and what do not, require previous advertisement.

Previous advertisement is required by that act in all cases other than those which are therein excepted; and among the latter the case where a route has been left vacant by the actual or virtual abandonment of a contract partially performed is not included.

In such case the Postmaster-General may make a new contract only after previous advertisement, and he has in the mean time no power to make intermediate provision without advertisement.

DEPARTMENT OF JUSTICE,

April 15, 1874.

SIR: The Attorney-General has referred to me your communication of the 9th instant, requesting his opinion whether the provisions of the act of 1872, chap. 335, (17 Stat., 283,) designating what "contracts for conveying the mail" require previous advertisement and what do not, cover all cases of such contracts.

I have carefully considered this question, and now submit the opinion that the above statute of 1872 furnishes the exclusive rule for determining what contracts do, and what do not, require previous advertisement.

The act of 1861, chap. 84, (12 Stat., 220,) applied to all "*purchases and contracts.*" The act of 1872 excludes from the operation of this previous statute all contracts of the class before us. It does this, not expressly, but by necessary conclusion of law, as being in reference to that class of contracts *contradictory* to the former. By section 243 the Postmaster-

Contracts for Carrying the Mail.

General is required to make advertisement for six weeks, &c., "*before making any contracts for conveying the mail other than those hereinafter excepted.*" This language is entirely explicit. It comprehends all cases of contracts and distributes them into two classes.

A further examination of it shows that *the rule*—a previous advertisement—extends to almost all cases; *the exceptions* are few, being (section 251) *contracts* for service intermediate to the failure of an accepted bidder, "to enter into a contract and the time when the next accepted bidder * * * shall enter upon the contract," (section 257;) *provisions* for carrying the mail during the *time lost* on account of the non-advertisement of a particular route at the regular lettings, (section 264;) *contracts* with the owners or masters of certain steamboats; and (section 265) *contracts* with railway companies.

The statute has not included among its exceptions cases where routes have been left vacant by the actual or virtual abandonment of contracts partially performed. So far as the Postmaster-General may have authority to make a *new contract*, in such cases, he is required to do it under *the rule* in section 243; and he has in the mean time no power to make *intermediate provision* without advertisement. Apparently, Congress is of the opinion that the public is sufficiently protected against the occurrence of such an abandonment by the bond of the contractor and the fines and penalties to which he is liable; for the alternative of supplying intermediate mail-service in such event under the requirement of a six weeks' advertisement is impracticable.

As your official position and experience in such matters make you the judge of the propriety of calling the attention of Congress to this subject as deserving consideration and perhaps remedy, I need add no more.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

THE POSTMASTER-GENERAL.

Approved April 18, 1874:

GEO. H. WILLIAMS.

 Refund of Customs-Duties.

REFUND OF CUSTOMS-DUTIES.

The provisions of the joint resolution of April 29, 1864, [No. 27,] and of the 20th section of the act of June 30, 1864, chap. 171, taken together, impose the additional duty of fifty per cent. mentioned in the former enactment only on goods imported after April 30, 1864.

Goods in warehouse are already "imported" within the meaning of those provisions; and consequently where goods were in warehouse on the 30th of April, 1864, they were not subject to the additional duty.

If such duty has been exacted upon goods which were in warehouse on that date, it is made the duty of the Secretary of the Treasury, by the said 20th section, to refund them: (But see, on this subject, opinion of July 6, 1874, *post*.)

DEPARTMENT OF JUSTICE,
May 27, 1874.

SIR: The Attorney-General has referred to me your communication of the 11th instant, asking his opinion as to the operation of the joint resolution of April 29, 1864, as modified by the 20th section of the act of June 30, 1864, upon goods *in warehouse on the 30th of April, 1864*.

The joint resolution provided that "until the end of sixty days from the passage of this resolution, fifty per cent. of the rates of duties and imposts now imposed by law on all goods, wares, merchandise, and articles imported shall be added to the present duties and imposts now charged on the importation of such articles."

The section of the act of June 30, 1864, above referred to, provided that the above joint resolution "shall not be deemed to have taken effect until after the 30th day of April, 1864, and shall be and remain in force until and including the 30th day of June, 1864, and any duties which shall have been exacted and received contrary to the provisions of this section shall be refunded by the Secretary of the Treasury."

Taken together, then, the above provisions impose the additional fifty per cent. only upon goods *imported after the 30th of April, 1864*; and if such fifty per cent. have been collected from other goods, then it has been exacted and received contrary to the provisions of the 20th section above, and therefore is to be refunded.

On the 6th of July, 1869, Attorney-General Hoar, as you mention, advised the then Secretary of the Treasury that "goods imported prior to the passage of the above resolution were not subject to additional duties thereunder."

 Refund of Customs-Duties.

The question has now arisen "whether the duties paid on goods which were in warehouse on the 30th of April, 1864, and upon which the duties were not paid until after that date, come within the purview of said 20th section, and, if so, whether said section of law is not compulsory upon the Secretary of the Treasury to refund the same."

The solution of the above question depends upon whether goods in *warehouse* are to be considered as already *imported*.

A long train of decisions answers this latter question in the affirmative. Mr. Hoar, in the communication mentioned by you, cites upon this point *Arnold vs. The United States*, (9. Cr., 104;) *The United States vs. Lyman*, (1 Mason, 482;) *The United States vs. Lindsey*, (1 Gall., 365;) *Prince, in error, vs. The United States*, (2 Gall., 204;) *Meredith et al. vs. The United States*, (13 Peters, 486;) *Pevots et al. vs. The United States*, (1 Pet. C. C., 256;) *The United States vs. Vowell et al.* (5 Cr., 368.) To these I will add the later ones of *The United States vs. Ten Thousand Cigars*, (2 Curtis, 436,) and *The United States vs. Dodge*, (Deady, 124.)

The rule established by these cases is, that where the duty is laid in general terms upon goods *imported*, the point of time which fixes the rate is that of the *arrival of the vessel* within a port of entry with intent to unlade. This leaves untouched the power of Congress, by apt words, to fix such time at that of the entry of the goods for consumption, as in the cases of *The United States vs. Benzon*, (2 Cliff., 512,) and *Smith vs. Draper*, (5 Blatch., 238.)

The language of the legislation to which you call attention brings this case under the rule above stated. Therefore, as the goods were imported before the 30th day of April, 1864, the fifty per. cent additional paid thereupon was exacted contrary to the provisions mentioned above, and ought, consequently, to be refunded. The provision for refunding in the 20th section is plainly "compulsory" upon the Secretary of the Treasury.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved May 29, 1874 :

GEO. H. WILLIAMS.

Employment of Counsel for the United States.

EMPLOYMENT OF COUNSEL FOR THE UNITED STATES.

The Attorney-General has no authority to stipulate to pay an attorney at law, under the name of a fee, a sum which, as is understood beforehand, is much larger than the professional services involved can be worth, and is intended to cover, in addition thereto, services not professional.

Nor has he any authority to contract for the collection of claims of the United States, stipulating to pay for such service a part of the money recovered.

Seem that, to enable any Department to make a valid contract for the prosecution of such claims, the power must be specially conferred by Congress.

DEPARTMENT OF JUSTICE,

June 10, 1874.

SIR: The indorsement of the Hon. William A. Richardson, late Secretary of the Treasury, upon certain papers constituting an application of John L. Pendery, esq., of Leavenworth, Kansas, referring the same, on the 9th of May, 1874, "to the honorable Attorney-General for *such action as he may deem necessary*," has, together with the papers in the case, been referred to me, and I herewith respectfully return the same to the Treasury Department.

The papers show that upon the 11th of May, 1872, Mr. Pendery made an application to the Secretary of the Treasury asking to be employed, under the act of May 5, 1872, in prosecuting a claim on behalf of the United States against the Kansas Pacific Railway Company. I understand that the claim in question was one brought to light, or at least to the attention of the Government, by him, and that it consists of a claim for money and, indirectly, for other property, on account of a violation of the charter of the company by charges of freight on transportation in excess of charges for like services to other parties. (12 Stat., 494.) After some doubt, the Secretary decided adversely to the application, and then, on the 9th of May, 1874, referred the papers to the Attorney-General, as above.

Upon an intimation being made in this Department to Mr. Pendery that the application was one out of its jurisdiction, and that, if he wished the matter considered, he should give

Employment of Counsel for the United States.

it a different form, on the 19th of the last month he filed an application with the Attorney-General for an appointment as an attorney at law on behalf of the United States to prosecute the above railway company for the above-mentioned violations of its charter.

From several conversations with Mr. Pendery, I learn that he proposes that, in case he be retained, he shall have a fee out of the proceeds of any recovery like that he might have been entitled to (twenty-five or fifty per cent. of the recovery) in case his application to the Secretary of the Treasury had been successful; that is, that his application to this Department does not vary substantially from that which has already been considered by the Secretary, except so far as the character of his appearance in the suit to be instituted is concerned. In the former application he was to be attorney in fact; now he desires to be attorney at law. Unless his views in this regard are admissible, he will withdraw the application. A client of Mr. Pendery is to share in the compensation, and he has been at so much expense and pains in getting up the information which is to be the basis of the proceeding, that, even should that compensation amount (as is anticipated by Mr. Pendery) to one or more hundred thousand dollars, it will not be more than the services to be made avail of are worth.

In having recourse to the Secretary of the Treasury, Mr. Pendery was correct in his judgment as to the proper Department to consider his application. It appears to me that although the amended form of such application renders it *prima facie* fit to be passed upon here, yet when it is found that, in substance, the application is no other than the one already passed upon by the Secretary of the Treasury, the matter should be remitted to him for further discussion and determination, if he see fit to reconsider it.

The act under which the application was first made has been recently repealed. If this is not to be regarded as an implied repeal of all authority, as well such as was exercised before the statute of 1872 as that which has been exercised under that statute, the jurisdiction to exercise it still remains, as before, with the Secretary of the Treasury.

Mr. Pendery stipulates in advance, as a *sine qua non*, for such compensation as will not only pay him for his professional serv-

Employment of Counsel for the United States.

ices, but also satisfy a client of his who has been active in procuring the information upon which the suit is to be based. This shows at once that the proposal is one not within the jurisdiction of this Department. There is no authority for the Attorney-General to stipulate to pay an attorney at law, under the name of a fee, a sum which, as is understood beforehand, is much larger than the professional services involved can be worth, and is sought to be justified upon the ground that a great part of it is to be shared by others, for services not professional—that is, payment for *disclosures*, &c.

Bryan's case (10 Opin., 40) before Attorney-General Bates comes under the same head. The services in that case were altogether unprofessional, but the principle extends, as a matter of course, to cases in which the services are partly of the one sort and partly of the other. There can be no difficulty in separating such. Compensation for the one may be stipulated for in this Department, while that for the other *cannot*, either directly or indirectly.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

THE SECRETARY OF THE TREASURY.

I will add to the foregoing, which I approve, that, in my opinion, the Attorney-General has no power to make a contract for the collection of money due the United States with an agreement to pay any portion of such money for services in its collection, without further legislation by Congress. The act of March 24, 1871, (17 Stat., 1,) provides that all such moneys paid into court, or received by the officers thereof, shall forthwith be deposited with the Treasurer, an assistant treasurer, or a designated depository of the United States. I think, too, that the legislation of Congress by which power has heretofore been conferred in certain cases upon the Treasury Department to make contracts of that nature, implies that, in the judgment of Congress, special power must be conferred by law to enable any Department to make a valid contract of that description.

GEO. H. WILLIAMS.

Case of Goodsell, Budillon & Co.

CASE OF GOODSSELL, BUDILLON & Co.

Pending the execution of an order for a re-appraisement of an importation of gloves, the importers, anxious to get their goods, proposed to leave samples on which to make the appraisement, and give a bond to pay "all duties and charges" finally assessed upon the importation, waiving all objections that might be made on the ground that the goods were not retained by the United States until final appraisement; and this arrangement was entered into by permission of the Secretary of the Treasury. The final appraisement resulted in an addition of more than ten per cent. beyond the invoice and entered values; so that, under ordinary circumstances, the goods would be liable to the additional duty of twenty per cent. imposed by the 7th section of the act of March 3, 1865, chap. 80. *Held* that, by the terms of the bond, it included the payment of such additional duty, and that the importers are liable therefor.

DEPARTMENT OF JUSTICE,

June 23, 1874.

SIR: On the 4th of May last the Acting Secretary of the Treasury asked the opinion of the Attorney-General whether Messrs. Goodsell, Budillon & Co., of Boston, were liable to an additional duty of twenty per cent. (by the 7th section of the act of March 3, 1865) upon certain gloves imported by them under the following circumstances:

A difference of opinion had arisen between the importers and the Government appraisers as to the dutiable value of such gloves. Re-appraisements were had, on one of which, the merchant-appraiser and the general appraiser disagreeing, the collector decided in favor of the value returned by the merchant-appraiser, which being satisfactory to the importers, subsequent importations were entered at the values so assessed. On such subsequent importations, however, the appraisers, dissatisfied with the value previously fixed, continued to advance the invoice value so as to arrive at what, in their opinion, was the true market-value of the gloves.

For the purpose of relieving the importers as much as possible from the embarrassment attendant upon a long litigation on re-appraisement, the Secretary of the Treasury, on the 6th of June, 1872, reciting that it had been represented to him that the importers' invoices were unnecessarily detained in the appraiser's office, and that the importers, being anxious to

Case of Goodsell, Budillon & Co.

get their goods, were willing to leave samples and give any bonds that might be required, directed the collector to allow them to be delivered as soon as practicable on such terms as he might deem proper. The delivery was accordingly made, upon a bond having been executed by the importers *to pay all duties and charges which may be finally assessed on said importation, to waive all objections on account of the goods not being retained until final appraisement, and to allow the question to be considered and determined upon samples with the same effect as if the entire importations were still in the custody of the Government.*

A recent re-appraisement of a large number of invoices of such gloves has resulted in an addition of more than ten per cent. beyond the invoice and entered values; so that, under ordinary circumstances, they would be liable to the additional duty of twenty per cent. before referred to. But it is claimed by the importers that, in view of the above arrangement between them and the Government, they ought to be relieved from its payment.

In this connection three reasons are suggested :

1. The values entered by them were such as had previously been fixed by the Government itself.

2. The importers were *mised* by the action of the Secretary of the Treasury as above, directing the collector to deliver the gloves.

3. The bond taken from them does not include the case under consideration.

1. The first reason assigned above goes upon the ground that the importers, under such circumstances, must be wholly innocent of any attempt to defraud the Government, their position being only that of *acquiescence* in a valuation fixed by the Government itself.

The statute which imposes the twenty per cent. penalty does not require that the undervaluation by the importer shall be fraudulent. (13 Stat., 494.) It requires no more than that the importer, at the time of entry, shall state in writing his *opinion* of the value of the goods, and then that appraisers shall review such valuation, with the consequence that if the *opinion* expressed by the importer fall short of the appraisement by more than ten per cent. the penalty shall be in-

Case of Goodsell, Budillon & Co.

curred. The penalty applies, for instance, to cases of unskillful and careless *opinions*, as well as to those that are fraudulent. Indeed it applies to all cases of shortcoming without reference to motives. The valuation by the merchant-appraiser, which in the present case was adopted by the collector in 1872, bound the Government only as regards that particular importation. This is so in the nature of things, and a letter of the Secretary to the collector at Boston, dated December 12, 1872, produced here by the importers, indicates that they had special notice that the appraiser, upon good reason, might disregard that valuation.

2. The action of the Secretary, whatever it amounted to, occurred *after the gloves had gone into the hands of the appraisers*. It was to release them from those hands that the importers made the application that resulted in such action. Now, the liability of importers to the twenty per cent. additional duty becomes *fixed* at a point of time previous to that when the appraisers take possession of the goods. It may be *ascertained* afterward, but it is *fixed* previously.

That liability is fixed by what occurs at the entry of the goods. The appraisers take possession of the goods after their *entry*, and pass upon conduct that is beyond the control of the importer at the time when submitted to their consideration.

Therefore, nothing that the Secretary said or did in relation to the possession of the goods by the appraisers could have misled the importers to do anything prejudicial to their interests as regards the twenty per cent. duty. The whole of their action bearing upon their liability to this duty must have been completed before the Secretary interfered.

In this connection it is proper to refer to another letter of the Secretary to the collector at Boston, also produced here by the importers, dated July 1, 1872, which directs the latter "not to allow the delivery of such gloves until such time as *due entry* thereof has been made," and also, in general, to the language of Mr. Justice Clifford in *Kimball vs. The Collector*, 10 Wall., at page 448, third paragraph.

It seems to me plain that the only object of the application to the Secretary and his only purpose in complying therewith were to relieve the importers from the annoyance of having

"Charges and Commission" Cases.

their goods *detained* while the question as to the duties upon them was settled, both parties understanding that this was to be done without prejudice to the Government from such loss of possession. The importers have had the full benefit of this arrangement, and the only question remaining is: Has this been done *without prejudice* to the Government?

3. I am of opinion that the bond given by the importers includes the present case. The additional twenty per cent. is at once a penalty and a duty. It is a *duty* by way of penalty. The obligors bind themselves expressly to pay all duties and charges which may be finally assessed upon such goods, and to waive all objections that might be made on the ground that the goods were not retained by the United States until final appraisement. These words appear to me to be clear, strong, and pertinent to the case stated in the communication to which this opinion is a response.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved June 27, 1874:

GEO. H. WILLIAMS.

"CHARGES AND COMMISSION" CASES.

On a question submitted by the Secretary of the Treasury as to the advisability of suing out writs of error in certain cases recently determined in the circuit court for the southern district of New York, known as the "charges and commission" cases: *Advised* that, for considerations stated both of a general and special character, it is inexpedient to bring writs of error in the cases referred to.

DEPARTMENT OF JUSTICE,
June 25, 1874.

SIR: In response to yours of the 10th instant, asking for the opinion of the Attorney-General whether writs of error should be prosecuted in what are known as the "charges and commission" cases, recently determined in the southern district of New York, I submit the following considerations:

Inasmuch as your reference to the questions involved is

"Charges and Commission" Cases.

very general, I will refer to them as given in the letter of George Bliss, esq., United States attorney, &c., addressed to you on the 4th of June last.

I understand these questions to be interesting to the Government only so far as regards transactions now passed, inasmuch as the statute at present in force, (13 Stat., 214, sec. 14, and 217, sec. 24,) as regards *protests* and *valuations*, makes special provision for the matters herein at issue.

I think it true that some of the principles which have been established by former Secretaries as well as by circuit courts of the United States, in cases like those before you, might well, in former years, have been brought by the Government before the Supreme Court. The propriety of doing so at present makes a very different question, inasmuch as those principles have been acquiesced in for year after year, and have formed the basis upon which vast amounts of business have been transacted in good faith between the Government on one side and importers on the other, the more so that, as said above, under the recent change of legislation the reversal of that series of decisions is not to affect *future* business. This remark is especially applicable to cases involving the *necessity* of protests and their *forms* under certain circumstances. As to such matters of *practice*, as it were, the United States is to be held bound by its acquiescence for a number of years in the decisions of its own officers, judicial and executive. The proper relief is that which has been administered, viz, an amendment of the statute.

The question as to what *charges* and *commissions* appraisers were, before the statute of June 30, 1864, to include in ascertaining the dutiable value of goods imported, is somewhat a different one. If that question had not been set at rest for the future by the above legislation, (13 Stat., 217, sec. 24,) there might be no objection to have it reconsidered. It was under the previous statute *debatable*, and some time since would have justified officers of the Government in bringing it before the Supreme Court. As it is, however, the vast majority of the cases presenting the question has uniformly been decided by Secretaries and by the courts adversely to the Government. It is not improbable that such decisions were correct. At all events it is hardly seemly to question their application

Land-Grant Railroads.

to that comparatively small remnant of cases upon which the old law still operates.

I understand Mr. Bliss to say that the parties who brought suit will abandon the issue as to *protests addressed to some predecessor of the collector sued*, in case the United States bring no writs of error as to the other points. I, therefore, say nothing in regard to the validity of such protests. Upon this issue being abandoned, I advise that the United States do not bring writs of error in the cases above referred to.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

THE SECRETARY OF THE TREASURY.

Approved June 29, 1874 :

GEO. H. WILLIAMS.

LAND-GRANT RAILROADS.

Provision in the act of June 16, 1874, chap. 285, prohibiting payment of any part of the money appropriated by that act for transportation of property or troops of the United States over any railroad constructed by the aid of a grant of public land on the particular condition therein referred to, or "upon any other conditions for the use of such road for such transportation," examined and explained.

The prohibition alluded to applies to railroads whose land-grants are conditioned for a *preference* in transportation, or for *ordinary* rates of transportation, or for *average* rates, &c., where such service is required by the Government, as well as to railroads whose land-grants contain a condition in favor of the Government (like the one mentioned in said provision) for *free transportation*.

But it is inapplicable to railroads in whose land-grants no conditions for the use of such roads by the Government appear.

DEPARTMENT OF JUSTICE,

June 29, 1874.

SIR: I have, at his instance, considered your communication of the 25th of June, addressed to the Attorney-General, in relation to the act of June 16, 1874, regulating the payment of land-grant railroad companies for transportation, &c., and in such connection I have taken advantage of the inclosures from the Quartermaster-General transmitted by you at the same time.

Land-Grant Railroads.

The question involved arises upon the following language in the act above cited, upon which a doubt arises, as you state, whether it includes all railroad companies to which grants have been made by Congress for the benefit of their roads, or only such as received land-grants on condition of free transportation of troops and property of the United States:

"That no part of the money appropriated by this act shall be paid to any railroad company for the transportation of any property or troops of the United States over any railroad which, in whole or in part, was constructed by the aid of the grant of public land on the condition that such railroad should be a 'public highway for the use of the Government of the United States free from toll or other charge,' or upon any other conditions for the use of such road for such transportation; nor shall any allowance be made out of any money appropriated by this act for the transportation of officers of the Army over any such road when on duty and under orders as a military officer of the United States. But nothing herein contained shall be construed to prevent any such railroad from bringing a suit in the Court of Claims for the charges for such transportation, and recovering for the same, if found entitled thereto by virtue of the laws in force prior to the passage of this act."

The distinction drawn by the above act is founded upon the presence or absence in such land-grants, *not* of conditions in general, but of a certain sort of conditions, viz, those *for the use of such road*.

Reference to the legislation under which, especially within the last ten years, land-grants have been made to railroad companies shows, in connection with the above question, that such grants may be divided into three classes:

1. Cases in which, in one form of expression or another, *free transportation* is expressly stipulated for.
2. Cases in which conditions of *preference* in transportation, or of *ordinary* rates of transportation, or of *average* rates, &c., are all that have been expressly imposed.
3. Cases where no conditions for the use of said road by the Government have been imposed.

In my opinion there can be no question that the first are

Land-Grant Railroads.

included within, and the third excluded from, the operation of the act of June 16, 1874, quoted above. The third class is a very small one, and probably exists by inadvertence of the legislature, but as Congress has limited its above prohibition to cases of grants "upon any other conditions for the use of such road," these, having no such condition attached, are not included.

I am of the opinion that cases under the second class are *included* within the prohibition. Indeed this is the only class upon which the act has any *effective* operation; for the first class is already excluded from payment by the very acts which grant the land, as has been recognized heretofore by the Department of War. (See inclosures.)

A consideration of the passage above quoted brings me to the conclusion that it was the intention of Congress to make no appropriation at present for any case where the original grant *may have* left to them control of the question; *and further*, by a comprehensive expression, to remit all questions as to the extent of that control to the Court of Claims. Congress has said, as it were, waiving all questions of the obligation of the United States to pay companies whose land-grants contain any condition for the use of their road until a decision by the Court of Claims, "We hereby direct that no part of this appropriation shall be used to pay such claims." It seems to me that in so doing Congress has only resorted to a method of raising and deciding such questions that is usual among parties to business transactions controlled by rules of law that are obscure.

In the mean time, what the Quartermaster-General has to do is to *maintain the issue* which Congress has directed with regard to railroad companies having any conditions for the use of their road incorporated with their land-grants, until the courts shall have settled it.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF WAR.

Approved June 30, 1874:

GEO. H. WILLIAMS.

Indian Reservations in Nebraska.

INDIAN RESERVATIONS IN NEBRASKA.

The State of Nebraska is not entitled, under section 12 of the act of April 19, 1864, chap. 59, (which provides that five per centum of the proceeds of the sales of all public lands lying within said State, which have been or shall be sold by the United States prior or subsequent to the admission of said State into the Union, &c., shall be paid to said State for the support of common schools,) to five per centum upon the value of the lands within that State which have been reserved by the United States for the occupancy of Indian tribes.

The 13th section of the same act, declaring that "the laws of the United States, not locally inapplicable, shall have the same force and effect in said State as elsewhere in the United States," does not extend the provisions of the 2d section of the act of March 3, 1857, chap. 104, to that State; nor, as it would seem, do the provisions of the latter section extend to that State *proprio vigore*.

But even assuming the contrary of this, and that the State of Nebraska (in one or other of the modes indicated) is entitled to participate in the benefits of said act of 1857, it, nevertheless, has no right to an account of lands within its boundary which are included in reservations to Indian tribes.

Distinction between the meaning and applicability of the terms "*permanent* reservations," as used in the act of 1857, and the meaning and applicability of the term "*reservation*," as used in the act of March 2, 1855, chap. 139, pointed out.

DEPARTMENT OF JUSTICE,

July 1, 1874.

SIR: In yours of the 22d instant, addressed to the Attorney-General, and by him referred to me, you state the following case and question:

"There are in the State of Nebraska several Indian reservations, created by treaties with the Indians, which treaties give to the respective tribes of Indians the right to occupy and enjoy their reservations without limit as to time. The State claims five per centum upon the value of the lands within said reservations, estimating the same at one dollar and twenty-five cents per acre. I desire to propound, for your consideration and opinion, the following question: Is the State of Nebraska entitled to five per centum upon the value of the lands in said State, estimating the same at one dollar and twenty-five cents per acre, which are included within Indian reservations created by treaties which grant to the Indians the occupancy and enjoyment of their reservations without limit as to time?"

Indian Reservations in Nebraska.

I understand the word *Indians* in the above question to include only "tribes of Indians," the expression used in the statement which precedes it. I have given the matter an attentive consideration, and have been much aided therein by the learned and thoughtful papers inclosed in your communication. The opinion which I now submit is, that such question is to be answered in the negative.

The language of the section which is supposed to entitle the State to have the question answered affirmatively is: "That five per centum of the proceeds of the sales of all public lands lying within said State which have been or shall be sold by the United States prior or subsequent to the admission of said State into the Union, after deducting all expenses incident to the same, shall be paid to the said State for the support of common schools." (13 Stat., 49, sec. 12.)

There seems to be nothing in this provision, taken alone, to authorize the claim in behalf of the State, inasmuch as ordinary "reservations" to the Indian tribes cannot be regarded as sales. All the public lands were originally lands *occupied* by tribal Indians, such occupation being subject to an ultimate fee-simple and a paramount control in the United States. A reservation to a tribe is a bounded tract, in the same condition; and whether severed from the original tract occupied by the particular tribe, or by way of substitution for such tract, the title and fundamental relations are the same. The word reservation (*q. d.*, something retained in its original condition) expresses all this. So far where it is a tribal reservation.

But the word is also used in a secondary sense, viz, to express the assignment of specified tracts to individual Indians, heads of families, &c., accompanied generally by contingent provisions, under which such land, by continued residence of the donee, (say for five years or more,) is to belong to him in fee-simple. Such arrangements have from their origin a contingent element, which distinguishes them from pure reservations, and when that contingency becomes fixed, the lands subject to them lose every quality of public lands; they then pass into private hands; and whether the transaction in which this occurs is substantially a sale depends upon whether it is upon a *consideration*.

Indian Reservations in Nebraska.

However, it is claimed that the 13th section of the act admitting Nebraska as a State, (13 Stat., 49,) which provides that the "laws of the United States, not locally inapplicable, shall have the same force and effect in the said State as elsewhere in the United States," when considered in connection with the 2d section of the act of March 3, 1857, which, after making provision for a certain account between the United States and the State of Mississippi, requires the Commissioner of the General Land-Office to state an account with "each of the other States" upon the same principles, confers the authority in question. The above act of 1857 required the Commissioner to account with and pay over to Mississippi, on the principle of allowance and settlement prescribed in an act to settle similar accounts between the United States and Alabama, five per cent. of the proceeds of the public lands within said State, including therein the several reservations under the various treaties with the Chickasaw and Choctaw Indians within the limits of said State, as in case of other sales, estimating the lands at one dollar and twenty-five cents per acre. Then follows the provision above referred to, requiring the Commissioner to state an account between the United States and each of the other States upon the same principles, &c., estimating all lands and "permanent reservations" at one dollar and twenty-five cents per acre. The act in relation to Alabama is that of March 2, 1855, (10 Stat., 630,) which required the Commissioner to state an account with Alabama, in order to ascertain what was due to that State because of five per cent. of the net proceeds of lands within her limits sold after her admission as a State, (as per the act of admission, 3 Stat., 491,) and to include in said account the said reservations under treaties with the Chickasaw, Choctaw, and Creek Indians within such limits, as in case of other sales.

It is material to observe that the above acts, in treating of Alabama and Mississippi, speak of "reservations," while in communicating the benefit of the account in question to the other States, the act of 1857 speaks only of "permanent reservations." This is to be explained by the history of the times. In 1855, and so in 1857, there remained in Alabama and Mississippi no tribal reservations for the Chickasaw,

Indian Reservations in Nebraska.

Choctaw, and Creek Indians. The only reservations there existing, and to be accounted for, were those to individuals, mentioned above, which, by analogy to the terms made use of by law-writers upon feuds, might be styled *impure*. The Choctaws, Creeks, and Chickasaws ceded all their lands east of the Mississippi, with the exception of such impure reservations, respectively by treaties of September 27, 1830, March 24, 1832, and October 20, 1832. (Indian Treaties, pp. 333, 336, and 381.) This fact was of course well known to the Congress which passed the act of 1857, and rendered it sufficient to refer to the reservations in those States in general terms; whereas, in communicating the same rights to each of the other States, (sec. 2,) inasmuch as these contained various sorts of reservations, it was necessary to limit the right to the kind recognized in the preceding section, by introducing the word *permanent*. Congress intended its bounty to be uniform, and made the gifts to the other States conform to that to Alabama and Mississippi. In this way also the provision accommodates itself to the reason of the thing, by which, as we have suggested above, a distinction is to be drawn, as regards these accounts, between land still public (as are tribal lands) and such as have passed into private hands, (as reservations to heads of Indian families and other individuals,) especially after the condition of "residence," &c., has been performed. As to the latter, Congress might very well undertake to account with the States. They have forever passed out of its control for a *consideration*, or at least upon some ground of policy which it may choose to regard as equivalent.

The wording of the statement and question in your communication renders it unnecessary for me to say more than that I think that, in the light of both history and reason, the word *permanent* excludes from the account all reservations to Indian tribes. I am not called upon to detain you with a discussion of the extent of its operation upon reservations to individuals; I mean whether it includes all of these without regard to the state of the condition annexed thereto, that is, whether performed or not. If the question be not concluded by the practice of the Commissioner, there seems reason for saying that the only reservations within the question are those which have become unconditional when

Indian Reservations in Nebraska.

it is taken. Only these have passed beyond the control of Congress and the chances of a future public sale.

To these considerations I will add that I do not think that the above expression in the act admitting Nebraska as a State, (which is common to all such acts,) giving to the laws of the United States, not locally inapplicable, the same force and effect in that State as elsewhere, has the operation claimed for it in this connection. It is to be recollected in such connection that the operation so claimed is not that of supplying to Nebraska a law otherwise wanting, but of changing a law already in existence and specially applied to that State by Congress in terms of its own choosing. Conceding that the terms of the gift to "each of the other States" in the act of 1857 are more liberal in one respect than those of the 12th section of the act of 1864, which *admitted* Nebraska, I ask your attention to the application sought in behalf of that State to be made of the 13th section of the latter act in regard to laws of the United States, not *inapplicable*, &c., which is—

1. Not only that a later statute shall be modified by an earlier one; and—

2. That later statute one specially enacted for Nebraska, while the former is a general statute passed before Nebraska was in existence, and in any case applicable to it only by construction; but—

3. The principle of the modification goes much beyond this and seeks to supply out of the earlier general statute only those terms that will render the later special one of more extensive operation, while rejecting such therein as tend to limit the latter act. For instance, the word *reservation*, whatever it may mean, is thereby to be introduced into the latter act, while those expressions in the former which limit the *sales* to be accounted for to such as occur subsequently to the admission of the State are to be rejected.

Waiving a discussion of the question whether the word *laws* in the 13th section above mentioned includes statutes like that of 1857, as well as the other question, whether the 2d section of the latter statute applies of its own force (according to a rule in general well established) to States subsequently admitted, I submit that neither of these questions can be so answered as to justify the present suggestion.

Indian Reservations in Nebraska.

It is questionable whether, in the total absence of the 12th section of the Nebraska act, the 13th section would supply that State with the benefits of the 2d section of the act of 1857. It is also questionable whether, in the absence of both of these sections, the 2d section of the act of 1857 would apply *proprio vigore* to Nebraska. But we are not at present practically interested in either of these questions. Congress upon the matter in hand has legislated for Nebraska in special terms, and these are as significant for that which is omitted from previous legislation on the same subject as for that which is added. I apprehend that there is no rule of statutory construction that will justify another Department of the Government in changing this particular form and pressure to the end suggested; and that there is no way by which that State can upon this point obtain the benefit (*not* of the statute providing elsewhere, which would exclude from her account all *previous* sales, but) of a provision which, to peculiar advantages of her own specially conferred by Congress, adds peculiar advantages bestowed upon the States, and, for all we know, deliberately withheld from her by Congress, but at all events omitted.

I have considered this matter with the more attention because of the opinion which you have transmitted with the other paper. I have taken great advantage from that opinion, although unable to concur in its conclusions.

Upon the whole, I am of the opinion—

1. That, even conceding that the State of Nebraska can make out a title to participate in the benefits of the act of 1857, she is not entitled to ask an account of lands within her boundary included in reservations to Indian tribes.

2. That her claim for an account depends for subject-matter entirely upon the words of the 12th section of the act of 1864 admitting her as a State, and that these exclude all reservations, permanent or other.

I have the honor to be, with great respect, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF THE INTERIOR.

Approved July 3, 1874:

GEO. H. WILLIAMS.

Refund of Customs-Duties.

REFUND OF CUSTOMS-DUTIES.

Re-examination of the 20th section of the act of June 30, 1864, chap. 117, in connection with the joint resolution of April 29, 1864, with reference to the subject of refunding the additional duty mentioned in the latter enactment under the provisions of the former, heretofore considered in opinion of May 27, 1874. (See *ante*, p. 653.)

The provision for refunding contained in said 20th section is limited to cases in which such additional duty has been exacted on importations made upon the 29th and 30th of April, 1864; it does not apply to cases where the duty has been exacted on goods which were imported *before* the 29th of April. View on this subject given in opinion of May 27, 1874, cited above, modified as respects the latter cases.

DEPARTMENT OF JUSTICE,

July 6, 1874.

SIR: Until my conversation with you a week or so since, I had not understood that in his communication of the 11th of May last, answered through me by the Attorney-General upon the 27th of the same month, your predecessor intended to ask for an opinion whether the provision for refunding in the 20th section of the act of June 30, 1864, chap. 171, applied to any other case of importation than such as occurred upon the 29th or 30th of April in that year. My attention was not drawn by that communication to importations upon those days as being a special class.

I have since given that question careful attention, and, upon the whole, am of the opinion that such provision applies only to importations upon the days named.

It seems that at the time of passing the above act two mischiefs had arisen in connection with the joint resolution of 29th of April, 1864; one of them special, the other casual and incident to all laws; the former arising out of the fact that the resolution went into effect suddenly, *i. e.*, upon the morning of the day on which it was adopted, (9 Cranch, 104;) the latter out of the fact that the Secretary of the Treasury had misconstrued the resolution, and thus given it operation even upon goods imported before the 29th of April, if found in warehouse at the time of its passage.

1. No question is made as to the application of the 20th section to the *former* mischief. Such application is palpable.

 Refund of Customs-Duties.

The section in terms postpones the operation of the resolution until after the 29th and 30th of April. This is equivalent to a declaration that for those days the duty ought never to have been exacted. If the section had gone no further, it would have left those who had imported during those two days, *and paid the duty*, without remedy; for, as the exaction when made was *legal*, they were not within the ordinary remedy of protest, &c. It therefore proceeds to create a special remedy for such persons, *i. e.*, a refunding by the Secretary of the Treasury.

2. For the latter mischief, the law clearly gave a sufficient remedy in authorizing importers to protest and appeal, and then recover the money paid by suit against the collector. This old remedy had been recognized and further regulated by sections 14 and 15 of the same statute. It is said, however, that as the Secretary had issued a circular adopting such wrongful constructions, no benefit could come of a protest and appeal, and, therefore, that the law excuses therefrom as being a *vain* thing. If this be so, the importer's right to make avail of the ordinary remedy of recovery from the collector was, in such cases perfect without a resort to these preliminaries. On the other hand, if it be not so, the importer is chargeable with *laches* in not protesting.

It may be suggested that although it turns out that the action of the Secretary did not in law do away with the necessity of a protest, &c., yet it *misled* importers into thinking that it did, and thereby into letting the season for protest slip. The evidence of the existence of such a mistake would properly be the fact that some importer had brought suit to recover his money. None such has been called to my attention.

But this is only a small part of what may be said in this connection. For there is nothing on the face of the 20th section to show that Congress regarded this as a mischief requiring legislation. Indeed, the defect here was not technically such a mischief, as it is admitted that there was already sufficient legislation upon this point; the difficulty being not in regard to the state of the law, but in regard to the understanding of the law by the officer who executed it. It is to be observed that whenever the legislature seeks to re-

Pacific Mail Steamship Company Contract.

move difficulties of this latter sort by further legislation *removing doubts, &c.*, it does so with much formality; generally reciting the existence of the mischief in a preamble, &c. Here, as I think, no one would guess from the wording of the section that there had been any erroneous administration of the joint resolution.

Upon consideration I read the above expression, "contrary to the provisions of this section," as meaning contrary to what this section effectively provides, any surplusage in the section being, in law, no part of it. The only effective previous provision of the 20th section is that for the two days' postponement, as the resolution of June 27 (13 Stat., 411) had already prolonged the operation of the joint resolution to the 30th of June inclusive. The resolutions of April 29 and June 27, and the 20th section, were passed at the same session of Congress. The two former were in full operation as law, and required no further legislation to confirm that operation as to any matter embraced by their words. As to this matter, therefore, the provisions of the 20th section, so far as they repeat such operation, are a mere nullity; and in law those provisions are those only which postpone the operation of the first resolution.

It follows from this, as from the considerations already presented, that the refunding under discussion applies only to cases of importation upon the 29th or 30th of April, 1864.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved July 7, 1874 :

GEO. H. WILLIAMS.

PACIFIC MAIL STEAMSHIP COMPANY CONTRACT.

The contract entered into with the Pacific Mail Steamship Company by the Postmaster-General, on the 27th of August, 1872, under the provisions of the act of June 1, 1872, chap. 256, whereby the former undertook to transport the mails between the United States and China and Japan in American steamships of a certain class and construction, for ten years,

Pacific Mail Steamship Company Contract.

commencing on the 1st of October, 1873, is still obligatory upon the Government, in view of the facts and circumstances presented, notwithstanding the failure on the part of the company to have vessels like those specified in the contract ready for use on the date last mentioned.

It was not an essential part of the contract that the new vessels should be furnished by that date, if it then satisfactorily appeared that they would be furnished within a reasonable time thereafter; and, taking into consideration the action and conduct of the Government officers, it would not be right, now that the vessels have been completed and offered for inspection, to refuse to receive them into service under the contract merely because they were not furnished at that time; besides, looking at the primary objects of the act of 1872, it would be subordinating these to unimportant matters so to do.

DEPARTMENT OF JUSTICE,*August 3, 1874.*

SIR: The case stated by you in your communication addressed to the Attorney-General, under date of the 22d ultimo, is, in brief, as follows:

By act of February 7, 1865, (13 Stat., 430,) the Postmaster-General was authorized to contract with the lowest bidder for a monthly steamship mail-service between San Francisco and China and Japan, in first-class American sea-going steamships of not less than three thousand tons burden, for a term of not more than ten years. This was accordingly done, and the service so contracted for has been continued until now by the Pacific Mail Steamship Company.

By act of June 1, 1872, (17 Stat., 201,) the Postmaster-General was further authorized to contract with the lowest bidder for a term of ten years from October 1, 1873, for an additional monthly mail-service between the above places, upon the same conditions and limitations, and at rates not to exceed those in the former contract, "provided that all steamships hereafter accepted for said service shall be of not less than four thousand tons register each, and shall be built of iron, and, with their engines and machinery, shall be wholly of American construction, and shall be so constructed as to be readily adapted to the armed naval service of the United States," &c., and to be inspected and reported to the Secretary of the Navy and the Postmaster-General as complying with this condition before acceptance, &c. Therefore, under date of August 27, 1872, the Postmaster-General entered into a con-

Pacific Mail Steamship Company Contract.

tract with the above company, as lowest bidder, by which the latter bound itself to transport the mails of the United States between, &c., twelve round trips per annum by an additional monthly line of first-class American steamships, to conform, in all respects, to the requirements and provisions of the 3d section of the act of Congress approved June 1, 1872, and the advertisement of the Postmaster-General issued in accordance therewith, dated June 5, 1872, and of sufficient number to perform the required monthly service for and during the term of ten years, commencing on the 1st of October, 1873, "and that the steamships hereafter offered for the service shall be of not less than four thousand tons register each, and shall be built of iron, and with their engines and machinery shall be wholly of American construction," &c., (pursuing the terms of the act;) also, "that this contract shall, in all its parts, be subject and in all respects governed by the requirements and provisions of the 3d and 6th sections of the act of Congress approved June 1, 1872, entitled," &c. The price to be paid for this service was \$500,000 per annum, (or at the rate of \$41,666.66 per voyage,) a *pro-rata* deduction to be made for any voyage omitted.

No ships like those specified in this contract have yet been offered and accepted, and out of this condition of things, as modified by facts yet to be stated, arise the questions mentioned below.

These facts are that since 1869, and with more or less frequency until now, the company has made extra trips, carrying the mails in excess of a monthly service, for which, upon its application, it has been paid under the provisions of the general law as for "sea-postage" up to and including a trip ending November 23, 1873. Some of these extra trips were, and some were not, by steamships accepted under the first contract. Since May, 1872, with a few omissions, these extra steamers have kept up a second monthly service.

In his annual report of November 14, 1873, the Postmaster-General states "that upon entering into the second contract the company immediately provided for the construction of two ships of the character specified in such contract; and that it is doing all that it can with its present resources to comply in good faith with the requirements of the contract at

Pacific Mail Steamship Company Contract.

an early day;" also, that he has not "felt at liberty either to annul the contract for the additional service on account of this failure, or to give any assurance, &c., for its continuance," although no good reason is perceived why the company should not be permitted to continue the service as at present until the new ships are completed and placed upon the line, "with the understanding that the company shall receive, as full compensation therefor, sea-postage only."

The situation of the parties to the second contract was made the subject of reports to the Senate at its late session by the Committees on Naval Affairs and on Post-Offices and Post-Roads. These agree in stating that the contract is still in force. No legislation occurred in that connection.

The Pacific Mail Steamship Company, on being asked by the Postmaster-General to account for its non-fulfillment of its contract, stated as its reasons therefor: first, that it was found by the contractor for the ships, as the work progressed, that the rolling-mills had no machinery large enough to roll the beams required, which for American ships were of an unprecedented size, and that five months were lost in preparing such new machinery; and, second, that other considerable time had been lost in consequence of labor-strikes. The company also suggests that the act of 1872, above, does not contemplate that the additional monthly service should be entirely by ships of the size, &c., specified in the contract; but only that such additional ships as might be "thereafter accepted" for that purpose should be; that the act contemplated the chances that the company might become contractors for such additional service, (as appears in section 6,) and therefore provided that the new requirements should affect only "all steamships hereafter accepted," leaving the company free to continue its use of all ships already accepted for postal service under the act of 1865. Therefore, that, under the facts already stated as to its extra trips, &c., it was virtually doing all that the law of 1872 required, and so all for which the parties to the second contract had intended to stipulate.

Upon the 8th ultimo, the company requested the inspection and acceptance of two new steamships, the "City of Peking" and the "City of Tokio," under the contract of August

Pacific Mail Steamship Company Contract.

20, 1873, which, as is alleged, conform to all the requirements of said contract.

In view of the above statement you ask whether the contract of August 20, 1873, not having been annulled by the Postmaster-General, is an existing agreement, under which the two ships should be inspected, and, if approved, accepted; or whether the continuance or abolition of such additional service is at the option of the Postmaster-General; or whether it has absolutely fallen by operation of law.

In my opinion the contract is still obligatory, and, therefore, the company is entitled to the inspection demanded, and to have its steamships, if accepted, placed in the additional mail-service, the continuance or abolition of which is not within the option of the Postmaster-General.

It seems to me plain that *the act of 1872* did not require such additional mail-service to be done in steamships of the new class unless such became necessary. The act refers expressly to the existing mail-contract between the places named; and then speaks of steamships "hereafter accepted" for the additional service, and requires them to conform to a certain description. Plainly if the steamships *heretofore* accepted should turn out to be sufficient for the new service as well as for the old, the special requirements as to steamships would have had no effect, for hereafter none such would be "accepted," as they would not be offered. But *the contract* does not expressly bind the company to transport the mails, &c., by an additional monthly line of first-class American steamships, to conform in all respects to the requirements and provisions of the 3d section of the act of Congress above cited, approved June 1, 1872, &c., and of sufficient number to perform the required additional monthly service for and during the term of ten years, commencing on the 1st of October, 1873. That is, the entire additional service was to be done in new vessels of the class specified. We have, then, a case in which an agent has varied the instructions of his principal so as to make a contract, perhaps, more beneficial for that principal, but certainly more onerous to the other party. What has subsequently happened is, that the contract as planned by the principal has been observed by the contractor, while the failure attributed affects

Pacific Mail Steamship Company Contract.

only the *variation*. Moreover, the failure is a failure to meet the *volunteer* stipulation (as it were) at the time by which it was to be kept, and that since that day has passed no notice has been given of an intention to avoid the contract therefor. This statement regards the parties as private persons. It seems to me that the fact that the principal here is the United States, that its plan of contract is therefore in a certain sense *public policy*, in that respect which departures therefrom are not, and that in the case before us what has happened is, that events have conformed to the declared policy of the Government, and that its views have succeeded, makes the case stronger for the position that *substantially* the relations between the parties remain unbroken; in other words, that the points in which the contract has been broken are immaterial. It being conceded that the purposes of Congress have been effected, it seems that other departments of the Government must hold that a failure to obtain in addition thereto other benefits stipulated for by agents appointed to make the contract is not, in general, matter of substance.

In the present case, for instance, Congress desired to put into operation a semi-monthly mail-service between San Francisco, Japan and China. This has been done. Congress provided that no steamship "hereafter accepted" for that service should be without certain qualifications. This also has been done. The Postmaster-General required in the contract, as drawn, that the *whole of that service* to commence October 1, 1873, should be in vessels having those qualifications. The company has failed herein. In the meanwhile the company has done all that it can with its present resources to comply in good faith with the requirements stipulated for by the Postmaster-General, and the latter, far from suggesting a forfeiture, reports to Congress, in effect, that the contract ought to be held as still subsisting; and thereupon Congress, by inaction, acquiesces in this view, which at the close of its session is indorsed by reports from two of its standing committees. In my opinion the matters in which the contract has been violated are not *substantial*; and even if they were, the right to take advantage of such violation has been waived.

Pacific Mail Steamship Company Contract.

I therefore repeat that the contract in question is still obligatory, and the company entitled to have the steamships mentioned above inspected, and, if accepted, placed in the additional mail-service, and that the Postmaster-General has no such *option* as above suggested.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

THE POSTMASTER-GENERAL.

Without questioning the correctness of the views on which the Solicitor-General's opinion is based, I prefer to put my approval of it on the following grounds:

1. Looking to the object of the act of June 1, 1872, authorizing an additional monthly mail-service between San Francisco, Japan and China, and taking into consideration the fact that such additional mail-service has been rendered as provided for in said act, I am of the opinion that it was not an essential part of the contract that the new iron steamships should be furnished by the 1st of October, 1873, if at that time it satisfactorily appeared that they would be furnished within a reasonable time thereafter.

2. On the 1st of October, 1873, it was well known by the Post-Office Department that the Pacific Mail Steamship Company was expending large sums of money in constructing such steamships as were required by the contract to perform the additional mail-service, as therein provided. But, instead of notifying the company that its failure as to time would be regarded as an end to the contract, the Department, it seems, afterward treated the contract as still subsisting; and, in view of that fact, and the subsequent proceedings in Congress, I do not believe it would be legal or right now, when the completed steamships have been presented for inspection, for the Government to refuse to receive them into service under said contract because they were not furnished by the 1st of October, 1873.

3. Considering that the act in question provides for a contract to continue ten years from the 1st of October, 1873, and that the primary objects of this legislation were to subserve the interests of American commerce and provide ships for the naval service of the United States in case of war, I

Traveling-Allowances of United States Marshals.

think it would be subordinating the great ends of the statute to unimportant matters to hold that the will of Congress upon the subject was wholly defeated by the failure of the company to furnish iron steamships within a few months of the time fixed by a specification in the contract, especially when such specification was outside of the requirements of the law authorizing the contract.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS.

TRAVELING-ALLOWANCES OF UNITED STATES MARSHALS.

The *proviso* in the appropriation act of June 16, 1874, chap. 285, declaring "that only *actual traveling-expenses* shall be allowed to any person holding employment or appointment under the United States," applies to United States marshals, and, therefore, supersedes the provision in the fee-bill (Rev. Stat., sec. 829) allowing mileage to those officers.

DEPARTMENT OF JUSTICE,

August 29, 1874.

SIR: The proviso in the "act making appropriations for the support of the Army for the fiscal year ending June thirtieth, eighteen hundred and seventy-five, and for other purposes," about which, in yours of the 25th instant, addressed to the Attorney-General, you ask whether it repeals or supersedes the allowance of mileage to United States marshals contained in the fee-bill, is as follows: "*Provided, That only actual traveling-expenses shall be allowed to any person holding employment or appointment under the United States, and all allowances for mileages and transportation in excess of the amount actually paid are hereby declared illegal; and no credit shall be allowed to any of the disbursing-officers of the United States for payments or allowances in violation of this provision.*"

This raises the question, how far the title and particular contents and character of a statute will control general expressions in a proviso incidental thereto. The general rules upon this subject are familiar; but it seems that, for very good reason, they are not applied to cases of legislation like the present, occurring in appropriation acts. In an opinion given by Attorney-General Cushing, dated June 30, 1855, (7

 Contracts with Post-Office Department.

Opin., 303,) upon a similar question, occurs the following language: "Congress has of late fallen into the very inconvenient practice of inserting provisions of general legislation in the acts of appropriation for a subsequent year. We have now to scan and scrutinize each separate clause or provision in those acts, and determine its legal meaning according to its particular tenor, wholly regardless of the place or the general nature of the act in which it is found."

In accordance with the principle thus announced, I am of the opinion that the proviso in question applies to all persons holding employment or appointment under the United States; and, therefore, that it supersedes the allowance of mileage to United States marshals in the fee-bill.

With great respect, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

THE SECRETARY OF THE TREASURY.

Approved August 31, 1874 :

GEO. H. WILLIAMS.

 CONTRACTS WITH POST-OFFICE DEPARTMENT.

Where the Postmaster-General advertised for proposals for furnishing the Post-Office Department with stamped envelopes, the advertisement reserving to him "the right to reject any and all bids, if in his judgment the interests of the Government required it:" *Held* that it was competent to the Postmaster-General to make such reservation and to act upon it.

DEPARTMENT OF JUSTICE,

September 16, 1874.

SIR: The Attorney-General has referred to me yours of the 15th instant, asking his opinion upon certain questions growing out of an order of your immediate predecessor which rejected *all the proposals* for furnishing stamped envelopes, &c., offered under an advertisement of the Post-Office Department dated July 13, 1874.

From an inclosure accompanying your note it seems that the Morgan Envelope Company was the lowest of such bidders, and that notwithstanding the rejection it claims the contract.

Traveling-Allowances of United States Marshals.

The advertisement reserved to the Postmaster-General "the right to reject any and all bids, if in his judgment the interests of the Government required it." It seems to me clear that the Postmaster-General has the power to make such reservation; that the exercise of such right does not conflict with the act of 1842, section 17, (5 Stat., 526,) which directs the method of making such contracts; and that the Morgan Company, after entering into a negotiation that bore upon its face the condition in question, has no legal ground for complaining of its enforcement. The mischief remedied by the act in question was that of contracting with other bidders than the lowest, and its words, directing that the latter, upon giving satisfactory security, &c., shall receive a contract, mean no more than that he only, of all the bidders, shall receive it. His rights are perfect as against all other bidders, but do not exclude the counter right of the Postmaster-General of considering, in the interests of the Government, the whole subject and of deciding whether it be fit that any bid shall be accepted.

In the present condition of the Revised Statutes of the United States it is difficult to say whether the above act has been retained. Under the head of Title XLIII, section 3709, are provisions for all purchases, and contracts for supplies or services, which will cover the case before us. If these be the only provisions upon this subject therein the power of the Postmaster-General to make and enforce such a condition is even more evident than under the act of 1842.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

THE POSTMASTER-GENERAL.

Approved September 17, 1874 :

GEO. H. WILLIAMS.

TRAVELING-ALLOWANCES OF UNITED STATES MARSHALS.

The provision in the act of June 16, 1874, chap. 285, as to the allowance of "actual traveling-expenses," supersedes the provision in the fee-bill (Rev. Stat., sec. 829) allowing mileage to marshals on account of each necessary guard employed in transporting prisoners, &c., the same as on any other account whatever.

Traveling-Allowances of United States Marshals.

In the case of a guard so employed, his compensation, actually and necessarily paid, constitutes, as well as his traveling-expenses, a part of the actual traveling-expenses of the marshal, within the meaning of the law.

DEPARTMENT OF JUSTICE,

September 30, 1874.

SIR: I have attentively considered your communication of the 14th instant to the Attorney-General, in which, in connection with the opinion of this Department addressed to yourself, dated August 29, 1874, (see *ante*, p. 681,) you ask the following questions:

1. Whether mileage to marshals for each necessary guard, while transporting prisoners, as provided by the act of February 26, 1853, is superseded by the *proviso* in the act of June 16, 1874; and, if so,

2. Whether marshals are authorized to include in their accounts for expenses such compensation as may be actually and necessarily paid to guards so employed, in addition to the traveling-expenses of the guards.

I see no way of avoiding the conclusion that the comprehensive expression in the Army appropriation act of June 16, 1874, in relation to mileage, applies as well to the mileage heretofore allowed to marshals on account of guards and prisoners transported by them, (Rev. Stat., sec. 829,) as to any other whatever. The effect of this is to confine marshals to their *actual traveling-expenses* allowed in the same section and also in the *proviso*.

It is the actual traveling-expenses of the marshal that are provided for. If a marshal, while traveling in the discharge of official duty, finds it necessary to employ a guard, I am of the opinion that, within the statute referred to, his *compensation*, actually and necessarily paid, is, as well as his *traveling-expenses*, a part of the actual traveling-expenses of such marshal.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved September 30, 1874:

GEO. H. WILLIAMS.

INDEX.

ACCOUNTS AND ACCOUNTING-OFFICERS.

1. The act of March 30, 1868, chap. 36, authorizes the head of a Department before signing a warrant for any balance certified by a Comptroller, to submit to the latter any facts which in his judgment affect the correctness of such balance; but it makes the decision of the Comptroller thereon final and conclusive upon the executive branch of the Government, and subject to revision by Congress or the proper courts only. Page 65.
2. The provision of the 4th section of the act of August 16, 1856, chap. 124, declaring that, as to the accounts of marshals, district attorneys, &c., "an appeal shall lie from the decision of the accounting-officers to the Secretary of the Interior," was impliedly repealed by the act of March 30, 1868, chap. 36. 104.
3. Prior to the act of 1856 there was no law authorizing an appeal in such cases to the Secretary of the Interior, and none was enacted subsequent to the act of 1868 down to the act of June 22, 1870, chap. 150, by which only such powers as were then exercised by the Secretary of the Interior over the accounts aforesaid were thereafter to be exercised by the Attorney-General. *Ibid.*
4. No statute has been passed since the last-mentioned act, giving an appeal from the accounting-officers to the Attorney-General in the cases referred to; and hence, under the existing law, such an appeal does not lie. *Ibid.*
5. A settlement was made by the accounting-officers of the Treasury with F., as assignee of certain parties, for the use and occupation of some buildings by the military authorities, whereupon he was paid the amount allowed. Subsequently another settlement was made with him, as assignee of certain other parties, for the use and occupation of other buildings by the same authorities, wherein, it having in the mean time been ascertained that the allowance on the first settlement was improper, and made in ignorance of a fact which, had the accounting-officers been cognizant thereof at the time, would have precluded such allowance, the amount paid as aforesaid was deducted, and only the balance remaining after the deduction allowed: *Held* that, notwithstanding the claims originally belonged to and were derived by assignment from different persons, it was competent to the accounting-officers, under the circumstances, to make a deduction in the last settlement of what had been improperly allowed and paid on the first. 412.

See COMPENSATION, 9; EIGHT-HOUR LAW, 3.

ADVERTISEMENTS.

1. The *proviso* in the act of March 3, 1875, chap. 128, making appropriations for the service of the Post-Office Department, was intended to relieve the heads of all the Executive Departments from the requirements of section 3826 of the Revised Statutes respecting the publication of advertisements, notices, and proposals for Virginia, Maryland, and the District of Columbia, as well as to provide specifically respecting the publication of mail-lettings by the Postmaster-General for the States and District above mentioned. 576.
 2. It is, accordingly, left discretionary with each head of Department whether he will make the publication referred to in that section in one or more papers of the District of Columbia. 577.
- See PRIVATE LAND-CLAIMS, 5, 6.

ALABAMA.

See GRANT, 13.

ALASKA.

1. The buildings in Alaska, consisting of warehouses, store-houses, blacksmith-shops, cooper-shops, fish-houses, dwelling-houses, &c., purchased by Hutchinson, Kohl & Co. from the Russian-American Company in March, 1868, were not included in the cession made by Russia to the United States in the treaty of March 30, 1867, and did not become the property of the latter under that treaty. 302.
2. But the Russian-American Company never had anything more than the *use* of the land on which its buildings stood—the *dominium* or right of property therein, ever remaining in the government of Russia; and by the 6th article of the treaty the right of possession, use, and all other privileges which that company then enjoyed in the soil, were in effect extinguished; so that the United States acquired under the said cession the absolute proprietorship of all the lands on which the establishments of that company were located, and as a consequence the latter could occupy such lands thereafter only by the sufferance of the Government of the United States. 303.
3. Hence, although the ownership of the buildings referred to may be in Hutchinson, Kohl & Co., under their purchase from the Russian-American Company, they acquired no interest whatever in the soil by the purchase of such buildings; they are simply occupants of the public domain, without right or title, and at the sufferance of the Government. *Ibid.*
4. By the act of March 3, 1873, chap. 227, the introduction of spirituous liquors or wine into the Territory of Alaska, unless authorized by the War Department, is absolutely prohibited. 327.
5. By virtue of the acts of February 13, 1862, chap. 24; March 15, 1864, chap. 33; and March 3, 1873, chap. 227, the War Department is clothed with a discretionary authority over the introduction of

ALASKA—Continued.

spirituous liquors or wines into the Territory of Alaska, and may permit such articles to be taken there, whether they are or are not intended for the use of officers or troops in the service of the United States. 401.

6. The first of these acts, though in form an amendment, is really a substitute for the whole of section 20 of the act of June 30, 1834, chap. 161, and nothing of said section not contained in that act is left in force. *Ibid.*

APPEAL.

See ACCOUNTS AND ACCOUNTING-OFFICERS, 2, 3, 4.

APPOINTMENT.

See ARMY, 4, 8, 9, 10, 12, 16, 19, 20, 21.

PPROPRIATIONS.

1. The appropriations made by the acts of June 15, 1864, chap. 124, and March 3, 1865, chap. 81, "for supplies, transportation, and care of prisoners of war," are in terms applicable to none but prisoners of war. 41.
2. By the words, "prisoners of war," as used in those acts, are meant persons of the enemy who are captured and detained by our forces; and therefore Union soldiers who were captured by the rebels and afterward escaped or were paroled are not within the scope of the appropriations mentioned. *Ibid.*
3. Accordingly, where persons of the latter description were supplied with necessities of life and otherwise aided by a private party, who presents a claim against the Government for re-imbursement of his outlays and compensation for his services: *Held* that the claim, however meritorious it may be, cannot be paid out of either of those appropriations. *Ibid.*
4. By act of March 3, 1871, chap. 113, an appropriation was made to meet (*inter alia*) the expense of publishing specifications and drawings required by the Patent-Office during the year ending June 30, 1872; the appropriation was to be disbursed by the Superintendent of Public Printing, under whose direction the execution of the work mentioned was then placed; but by the act of March 24, 1871, chap. 5, the Joint Committee of Congress on Printing was authorized to transfer the direction of the work to the Commissioner of Patents, should it be deemed expedient to do so, and on the 16th of June, 1872, such transfer was made: *Held* that, notwithstanding the transfer of the direction of the work, the appropriation was still applicable to the payment of expenses incurred in its prosecution, and might therefore be employed by the Superintendent of Public Printing in payment of work done under the direction of the Commissioner of Patents; *yet held, also*, that under section 5 of the act of July 12, 1870, chap. 251, the appropriation, having been made specifically for the fiscal year ending June 30, 1872, was only applicable to expenses incurred during that year, or to the fulfillment of contracts made within the same period. 58.

APPROPRIATIONS—Continued.

5. The expenditure of the appropriation provided by the act of June 10, 1872, chap. 416, "for continuing the work on the canal at the Falls of the Ohio River," whether made with or without the consent of the Louisville and Portland Canal Company, will not affect any rights which the latter may now have as to tolls. 90.
6. The direction of the entire work on the new State, War, and Navy Department building, and the disbursement of the appropriations provided therefor, are by law devolved upon the Secretary of State. 409.

ARKANSAS.

1. Review of the respective claims of Elisha Baxter and Joseph Brooks—each of whom having made application for Executive aid to suppress an insurrection in Arkansas—to be recognized by the President as governor of that State. 391.
2. Upon consideration of the constitution and laws of the State, the decisions of its highest judicial tribunal, and the actual determination of the controversy between those parties by the general assembly of the State, which, according to the rulings of the said tribunal, had exclusive jurisdiction of the matter in controversy: *Advised* that Elisha Baxter be recognized by the President as the lawful governor of the State. *Ibid.*
3. The act of December 13, 1872, chap. 2, does not require interest on overdue coupons of the bonds of the State of Arkansas, then held by the United States as Indian trust-funds, to be exacted by the Secretary of the Interior, in the "arrangement" to be made by the State mentioned in the *proviso* of the 1st section of that act. 611.

ARMS FOR THE MILITIA.

See MILITIA.

ARMY.

1. Vacancies created in the Quartermaster's Department by the act of July 28, 1866, chap. 299, from above the rank of assistant quartermaster to that of colonel, were required to be filled by promotion according to seniority, except in case of disability or other incompetency. 2.
2. The Army Regulations of 1863, in regard to promotions in the Army, have, by virtue of section 37 of the said act, the force of law. *Ibid.*
3. The words "all vacancies," used therein, cannot be rightfully construed to apply to vacancies occurring in a particular way only, but they include a vacancy that arises on the creation of a new office as well as one that happens by the resignation or death of an incumbent. *Ibid.*
4. By section 17 of the act of July 28, 1866, chap. 299, there were allowed in the Medical Department of the Army one chief medi-

ARMY—Continued.

- cal purveyor and four assistant medical purveyors, each with the rank and pay of a lieutenant-colonel of cavalry; and the 6th section of the act of March 3, 1869, chap. 124, prohibited any new appointments or promotions in that department until otherwise directed by law. A vacancy in the office of chief medical purveyor having occurred subsequent to the date of the last-mentioned act: *Held* that the provisions thereof forbid the filling of the vacancy by the appointment of one of the assistant medical purveyors thereto; that such an appointment would constitute a promotion, in view of the relative superiority of the position, and come within the statute, though it involved no increase of pay. 10.
5. The purpose of the act of June 8, 1872, chap. 351, is to put Nelson H. Davis in the same grade in the Inspector-General's Department, and in the same place relatively in that grade, which he would now hold and occupy had he been regularly promoted to fill the vacancy in that department caused by the death of Inspector-General Henry Van Rensselaer on the 23d of March, 1864. 117.
 6. That purpose will be effected by appointing him to the office of Inspector-General, to take rank next after Colonel Schriver; and this would necessarily make him (as by the statute he is entitled to be) senior in rank to Colonel Hardie. *Ibid.*
 7. The claim of Major Absalom Baird to fill the vacancy in the Inspector-General's Department caused by the advancement of Lieutenant-Colonel Nelson H. Davis, under the act of June 8, 1872, chap. 351, is inadmissible; the authority to appoint conferred by that act being exhausted by the appointment of the last-named officer, and the filling of the vacancy, accordingly, being precluded by force of the 6th section of the act of March 3, 1869, chap. 124. 164.
 8. Review of the laws and regulations pertaining to appointments and promotions in the military service. *Ibid.*
 9. It may now be considered to be definitely settled, by the practice of the Government, that the *regulation and government* of the Army include, as being properly within their scope, the regulation of the appointment and promotion of officers therein. *Ibid.*
 10. Hence, as the Constitution expressly confers upon Congress authority "to make rules for the government and regulation of" the Army, that body may impose such restrictions and limitations upon the appointing power as it deems proper in regard to promotions or appointments to any and all vacancies in the Army, provided the restrictions and limitations be not incompatible with the exercise of the appointing power. *Ibid.*
 11. Previous to the act of July 28, 1866, chap. 299, the Secretary of War, with the approval of the President, might, by virtue of the act of April 24, 1816, chap. 69, at discretion, adopt alterations in the regulations for the Army; and the regulations thus modified had the sanction of Congress under the latter act, so far at least

APPROPRIATIONS—Continued.

5. The expenditure of the appropriation provided by the act of June 10, 1872, chap. 416, "for continuing the work on the canal at the Falls of the Ohio River," whether made with or without the consent of the Louisville and Portland Canal Company, will not affect any rights which the latter may now have as to tolls. 90.
6. The direction of the entire work on the new State, War, and Navy Department building, and the disbursement of the appropriations provided therefor, are by law devolved upon the Secretary of State. 409.

ARKANSAS.

1. Review of the respective claims of Elisha Baxter and Joseph Brooks—each of whom having made application for Executive aid to suppress an insurrection in Arkansas—to be recognized by the President as governor of that State. 391.
2. Upon consideration of the constitution and laws of the State, the decisions of its highest judicial tribunal, and the actual determination of the controversy between those parties by the general assembly of the State, which, according to the rulings of the said tribunal, had exclusive jurisdiction of the matter in controversy: *Advised* that Elisha Baxter be recognized by the President as the lawful governor of the State. *Ibid.*
3. The act of December 13, 1872, chap. 2, does not require interest on overdue coupons of the bonds of the State of Arkansas, then held by the United States as Indian trust-funds, to be exacted by the Secretary of the Interior, in the "arrangement" to be made by the State mentioned in the *proviso* of the 1st section of that act. 611.

ARMS FOR THE MILITIA.

See MILITIA.

ARMY.

1. Vacancies created in the Quartermaster's Department by the act of July 28, 1866, chap. 299, from above the rank of assistant quartermaster to that of colonel, were required to be filled by promotion according to seniority, except in case of disability or other incompetency. 2.
2. The Army Regulations of 1863, in regard to promotions in the Army, have, by virtue of section 37 of the said act, the force of law. *Ibid.*
3. The words "all vacancies," used therein, cannot be rightfully construed to apply to vacancies occurring in a particular way only, but they include a vacancy that arises on the creation of a new office as well as one that happens by the resignation or death of an incumbent. *Ibid.*
4. By section 17 of the act of July 28, 1866, chap. 299, there were allowed in the Medical Department of the Army one chief medi-

ARMY—Continued.

- cal purveyor and four assistant medical purveyors, each with the rank and pay of a lieutenant-colonel of cavalry; and the 6th section of the act of March 3, 1869, chap. 124, prohibited any new appointments or promotions in that department until otherwise directed by law. A vacancy in the office of chief medical purveyor having occurred subsequent to the date of the last-mentioned act: *Held* that the provisions thereof forbid the filling of the vacancy by the appointment of one of the assistant medical purveyors thereto; that such an appointment would constitute a promotion, in view of the relative superiority of the position, and come within the statute, though it involved no increase of pay. 10.
5. The purpose of the act of June 8, 1872, chap. 351, is to put Nelson H. Davis in the same grade in the Inspector-General's Department, and in the same place relatively in that grade, which he would now hold and occupy had he been regularly promoted to fill the vacancy in that department caused by the death of Inspector-General Henry Van Rensselaer on the 23d of March, 1864. 117.
 6. That purpose will be effected by appointing him to the office of Inspector-General, to take rank next after Colonel Schriver; and this would necessarily make him (as by the statute he is entitled to be) senior in rank to Colonel Hardie. *Ibid*.
 7. The claim of Major Absalom Baird to fill the vacancy in the Inspector-General's Department caused by the advancement of Lieutenant-Colonel Nelson H. Davis, under the act of June 8, 1872, chap. 351, is inadmissible; the authority to appoint conferred by that act being exhausted by the appointment of the last-named officer, and the filling of the vacancy, accordingly, being precluded by force of the 6th section of the act of March 3, 1869, chap. 124. 164.
 8. Review of the laws and regulations pertaining to appointments and promotions in the military service. *Ibid*.
 9. It may now be considered to be definitely settled, by the practice of the Government, that the *regulation and government* of the Army include, as being properly within their scope, the regulation of the appointment and promotion of officers therein. *Ibid*.
 10. Hence, as the Constitution expressly confers upon Congress authority "to make rules for the government and regulation of" the Army, that body may impose such restrictions and limitations upon the appointing power as it deems proper in regard to promotions or appointments to any and all vacancies in the Army, provided the restrictions and limitations be not incompatible with the exercise of the appointing power. *Ibid*.
 11. Previous to the act of July 28, 1866, chap. 299, the Secretary of War, with the approval of the President, might, by virtue of the act of April 24, 1816, chap. 69, at discretion, adopt alterations in the regulations for the Army; and the regulations thus modified had the sanction of Congress under the latter act, so far at least

ARMY—Continued.

- as they came not in conflict with the provisions of any later statute; but by the said act of 1866 this authority of the Executive to alter or modify was taken away. *Ibid.*
12. Accordingly, the rules which existed at the date of the act of 1866, concerning the subject of appointment and promotion in the Army became, as it were, fixed; and, having the force of law, they must be taken to control the appointing power in regard to that subject until Congress shall otherwise direct. *Ibid.*
 13. In view of the 18th section of the act of July 15, 1870, chap. 294: *Held* that General William T. Sherman cannot act as Secretary of War without vacating his commission as General of the Army. 200.
 14. Where an Army officer was mustered out of service with one year's pay and allowances, under the 3d section of the act of July 15, 1870, chap. 294, and in about two years afterward was re-appointed to an office in the Army: *Held* that there was no authority to compel him to refund such pay and allowances, and that the same could not be legally retained out of his pay. 230.
 15. One complete annual return of ordnance and ordnance-stores, with quarterly reports noting all intermediate changes since last return, if sanctioned by the Chief of Ordnance and approved by the Secretary of War, is sufficient under the provisions of the acts of March 3, 1813, chap. 48, and February 8, 1815, chap. 38. 229.
 16. After a review of the history of the case of Lieutenant-Colonel B. S. Roberts, which is founded upon the alleged invalidity of an appointment in the Army made above twenty-seven years ago: *Advised* that the case ought to be considered as finally determined by the decisions of the executive department of the Government heretofore given, and the action of the Senate heretofore had, affirming, directly or indirectly, the validity of that appointment, and should accordingly be regarded as *res adjudicata*. 344.
 17. Act of June 23, 1874, chap. 499, directing the Secretary of War "to amend the record of the said A. H. Von Luettwitz, so that he shall appear on the rolls and records of the Army for rank as if he had been continuously in service," construed. 448.
 18. It is the duty of the Secretary, under the act, to erase from the rolls and records any entry or statement showing that Von Luettwitz was cashiered; but this will not *ipso facto* restore the latter to the office from which he was dismissed. *Ibid.*
 19. Considering the intent of the act, however: *Advised* that the President is authorized thereby to immediately appoint Von Luettwitz a first lieutenant in the usual way, with pay to commence from the date of the act. *Ibid.*
 20. Where an officer in a regiment has resigned, or is lawfully dismissed from the service, and his connection with the Army has thus ended, he cannot afterward be legally restored by re-appointment to his former grade and position, if he would thereby be made to outrank other officers then already holding commissions in the regiment, unless such re-appointment is specially authorized by Congress. 499.

ARMY—Continued.

21. The re-appointment in the above case is precluded by the Army Regulations, which have the force and effect of law, and which require, as a general rule, all vacancies in the regimental offices to be filled by promotion according to seniority. 500.
22. The claim of General Schuyler Hamilton to be placed on the retired list of the Army, based on his appointment to the staff of Brevet Lieutenant-General Scott as a military secretary, is inadmissible under the laws in force; he not being now an officer on the active list by virtue of that appointment. 506.
23. Under the act of March 3, 1857, chap. 106, Brevet Lieutenant-General Scott was entitled, when exercising command according to that rank, and then only, to the staff to which he had appointed General Hamilton; and upon the retirement of the former from active service, and consequent withdrawal from command, to wit, on the 1st of November, 1861, the appointment of the latter was *ipso jure* revoked. *Ibid.*

See ENLISTMENT.

ARTICLES OF WAR.

See JURISDICTION, 1; LIMITATIONS, 1, 2, 5, 6.

ATTORNEY-GENERAL.

1. A committee of the House of Representatives having referred the papers in certain claims to the Attorney-General, with a request for an official opinion thereon, the papers were returned unaccompanied by an opinion, the Attorney-General holding (in accordance with the views of several of his predecessors on the same point) that it is not within his province to advise committees of Congress upon questions of law occurring in matters before them. 17.
2. The act of June 22, 1870, chap. 150, establishing the Department of Justice, made no change in the law as to the duty of the Attorney-General in giving official opinions, according to which, as it has been repeatedly held, he is authorized to give an opinion upon a question of law only on the submission thereof by the President or by the head of an Executive Department. 21.
3. The Assistant Attorney-General attached to the Interior Department having prepared an opinion upon a case previously referred to him by the Secretary of the Interior for examination, and having submitted the same to the Attorney-General for approval: *Held* that the approval or disapproval of the said opinion by the Attorney-General would in effect be giving his official opinion where it is not called for by the President or by the head of a Department, and, therefore, where it is not authorized by law to be given. *Ibid.*

Where different statements of facts appear in any case that has been submitted by the head of a Department to the Attorney-General, the latter will not undertake to reconcile the differences between them

ATTORNEY-GENERAL—Continued.

but in giving an opinion upon the questions presented will consider only such facts as are set forth or admitted by the head of the Department. 45.

5. The Attorney-General is not authorized to give an official opinion upon a question involving the estimation of the weight and credibility of testimony offered in support of a claim; this being mere matter of fact, which appropriately belongs to the officers charged with the adjustment and settlement of the claim to determine. 54.
6. Where, at the solicitation of a committee of the Senate, an opinion from the Attorney-General was requested by the Acting Secretary of the Interior, upon a matter which had been previously submitted by the latter to Congress, and which was then under the consideration of said committee, for whose information solely the opinion was desired: *Held* that the Attorney-General is not authorized to give his official opinion in such case, the request being virtually an application from the committee for counsel in a matter of legislation. 177.
7. The decisions of former Attorneys-General, to the effect that it is not the duty of the Attorney-General to advise either House of Congress, or any committee thereof, upon any matter pending before the same, cited and affirmed. *Ibid*.
8. Where the question presented was very indefinite and vague, and partook of a speculative character, it was deemed inadvisable by the Attorney-General to give his official opinion thereon. 191.
9. Where an official opinion from the Attorney-General is desired on questions of law arising on any case, the request should be accompanied with a statement of the material facts of the case, and also the precise questions on which advice is wanted. 367.
10. The question proposed in the case of George M. Giddings—which has special reference to the provision in section 3480 of the Revised Statutes, prohibiting the payment of certain claims which existed prior to April 13, 1861, and is in substance whether the claimant's demand "accrued or existed" prior to that date—being regarded as purely a question of fact, to be made out from the evidence presented, and not in any aspect a question of law, the Attorney-General declined giving an opinion thereon. 526.
11. An impressment of property is simply a *conclusion of fact*, to be deduced from other facts established by the evidence submitted; and hence it is not within the province of the Attorney-General to determine the question whether there was or was not an impressment in a particular case. 536.
12. The Attorney-General has no authority to stipulate to pay an attorney at law, under the name of a fee, a sum which, as is understood beforehand, is much larger than the professional services involved can be worth, and is intended to cover, in addition thereto, services not professional. 653.
13. Nor has he any authority to contract for the collection of claims of the United States, stipulating to pay for such service a part of the money recovered. *Ibid*.

ATTORNEY-GENERAL—Continued.

14. *Semle* that, to enable any Department to make a valid contract for the prosecution of such claims, the power must be specially conferred by Congress. *Ibid.*

See ACCOUNTS AND ACCOUNTING-OFFICERS, 3, 4; PARDON, 2.

BANKRUPTCY.

1. Where a payment is made by a debtor to a creditor who has committed an act of bankruptcy, and against whom proceedings in bankruptcy have been instituted and are pending, but who has not yet been adjudged a bankrupt, it will not be a valid satisfaction of the debt, in the event of an adjudication of bankruptcy in such proceedings, if the payment transpired subsequent to the filing of the petition therein. 330.
2. But a payment made by a debtor to a creditor who is known to have committed an act of bankruptcy, but against whom proceedings have not at the time been taken, is valid, so far at least as the present bankrupt-law is concerned. 331.
3. All debts and liabilities subsisting in favor of the bankrupt at the period when the petition was filed, or then constituting a part of his estate, together with the right to receive or sue for and recover the same, become, upon the execution of the assignment, completely and exclusively vested in the assignee by relation to that period. *Ibid.*
4. Hence a payment to the bankrupt of any such debt or liability after that date would be no satisfaction of the demand as against the claim of the assignee, *unless the payment is protected by some exception made by Congress which covers the particular case.* *Ibid.*
5. Neither the bankrupt act of 1837, nor its supplements, contain any exception, express or implied, in favor of a debtor who has paid his debt to the bankrupt after the time of filing the petition against the latter. *Ibid.*
6. It follows that the claim of the assignee, duly appointed, must prevail against the debtor, notwithstanding such payment, though it was made *bona fide*, and without knowledge of the bankruptcy proceeding. *Ibid.*

See CONTRACT, 3.

BOND.

Pending the execution of an order for a re-appraisement of an importation of gloves, the importers, anxious to get their goods, proposed to leave samples on which to make the appraisement, and gave a bond to pay "all duties and charges" finally assessed upon the importation, waiving all objections that might be made on the ground that the goods were not retained by the United States until final appraisement; and this arrangement was entered into by permission of the Secretary of the Treasury. The final appraisement resulted in an addition of more than ten per cent. beyond the invoice and entered values; so that, under ordinary cir-

BOND—Continued.

cumstances, the goods would be liable to the additional duty of twenty per cent. imposed by the 7th section of the act of March 3, 1865, chap. 80. *Held* that, by the terms of the bond, it included the payment of such additional duty, and that the importers are liable therefor 658.

See OFFICIAL BOND, 1, 2.

BONDS OF THE DISTRICT OF COLUMBIA.

See DISTRICT OF COLUMBIA, 10, 11, 12, 14, 15, 16, 17, 18.

BOUNTY.

1. Where a soldier was enlisted in the Army as a volunteer in December, 1861, for three years, but afterward, and before the expiration of his term of enlistment, was voluntarily transferred to the naval service, in which he served out the remainder of his term: *Held* that he is not entitled to the additional bounty provided by the act of July 23, 1866, chap. 296. 223.
2. Eurollment before the proclamation and orders mentioned in the act of April 22, 1872, chap. 114, were issued, does not preclude a claim for bounty under that act, where the company or regiment was mustered into the military service of the United States prior to July 22, 1861, under the said proclamation and orders. 581.
3. Where the discharge-certificate of a soldier who belonged to a company or regiment thus mustered is in the usual form of one given upon an honorable discharge from the military service, the character of his discharge from service must be deemed to be (what his discharge-certificate represents it to be) honorable, and to entitle him to bounty under said act, whatever may have been the circumstances under which his company or regiment was disbanded. *Ibid.*

BRIDGE.

1. The Government may permit the Davenport and Saint Paul Railroad Company to use the bridge across the Mississippi River at Rock Island, upon the payment by that company of one-third of the cost thereof, one-half of which to be paid to the United States and the other half to the Chicago, Rock Island and Pacific Railroad Company, (assuming that the latter company has complied with the requirements of the joint resolution of July 20, 1868.) 32.
2. The provision in the act of June 4, 1872, chap. 231, entitled "An act further regulating the construction of bridges across the Mississippi River," which requires the Secretary of War, in locating any such bridge, to "have due regard to the * * * wants of all railways and highways crossing said river," commented on and construed. 91.
3. Where a bridge is to be located under an act wherein only railway use is mentioned and provided for, the wants of railways only are to be considered. *Ibid.*

BRIDGE—Continued.

4. But it is otherwise where the bridge is to be located under an act providing for both railways and wagon-ways. There the wants of both kinds of road are to be regarded, and the location should be made with a view to the accommodation of each. 92.
5. Provisions of the acts of April 1, 1872, chap. 73, and June 4, 1872, chap. 281, relative to the location and construction of railroad-bridges across the Mississippi River, examined, and the authority of the Secretary of War in the premises stated and defined. 254.

CALIFORNIA.

See LANDS, PUBLIC, 2, 4, 5, 6; PRIVATE LAND-CLAIMS, 1, 4, 5, 6.

‘CHARGES AND COMMISSION’ CASES.

On a question submitted by the Secretary of the Treasury as to the advisability of suing out writs of error in certain cases recently determined in the circuit court for the southern district of New York, known as the “charges and commission” cases: *Advised* that, for considerations stated, both of a general and special character, it is inexpedient to bring writs of error in the cases referred to. 661.

CHOCTAW INDIAN BONDS.

See INDIANS, 1.

CITIZENSHIP.

1. By the 1st article of the convention of September 20, 1870, between the United States and the Austro-Hungarian monarchy, the right of an American citizen to change his nationality and become a citizen of Austria is recognized; but he must have had a residence of five years in that country, besides being naturalized there, before the United States are bound to consider him as such. 154.
2. *Quære*, whether political duties or burdens, such as military service, might lawfully be imposed by Austria upon a person residing there who by birth is an American citizen, but who under the laws of that country (by having been born of Austrian parents only temporarily residing here) is also an Austrian citizen, without the consent of that person, or without his signifying by some act or declaration his will to be a citizen of that country. *Ibid*.
3. If he has voluntarily assumed the character of an Austrian citizen, however, and has resided in Austria five years, it cannot be reasonably maintained by this Government that his Austrian citizenship, or the political obligations appertaining thereto, may be cast aside by him at pleasure, so long as he continues to reside within the jurisdiction of that country. *Ibid*.
4. A naturalized citizen who resides abroad has the same right to the protection of the Government, and stands upon the same footing in all other respects, as a citizen by birth residing abroad. 295.

CITIZENSHIP—Continued.

5. Children born abroad of persons once citizens of the United States, but who have become citizens or subjects of a foreign power, are not citizens of the United States, nor, as such, entitled to their protection. *Ibid.*
6. A native-born citizen of the United States who has been naturalized in a foreign country, and thus become a citizen or subject thereof, is to be regarded as an alien; and he cannot re-acquire American nationality except in conformity to the laws of the United States providing for the admission of aliens to citizenship therein. *Ibid.*
7. Authorities upon the construction of the 2d section of the act of February 10, 1855, chap. 71, reviewed, and the following conclusion deduced therefrom, viz, that any free white woman, not an alien enemy, who is married to a citizen of the United States, is, by reason of her marriage, to be deemed a citizen of the United States, irrespective of the time or place of the marriage or the residence of the parties. 402.
8. *Held*, accordingly, that an alien woman who has intermarried with a citizen of the United States residing abroad—the marriage having been solemnized abroad, and the parties after the marriage continuing to reside abroad—is to be regarded as a citizen of the United States, within the meaning of said act, though she may never have resided in the United States. 403.
9. By a copy of the registry of births at Hamburg, in Germany, it is shown that Rudolph Carl Levy was born in that place on the 22d of February, 1853; and on the 10th of July, 1873, he was admitted to citizenship in the United States, under the name of Charles Levy, by the court of hustings of the town of Staunton, in the State of Virginia, as shown by the record of that court. Upon the question whether Levy should be recognized by the United States as a citizen thereof: *Advised* that the judgment of said court (it appearing to have jurisdiction in the matter of admitting aliens to citizenship, and there being no appeal from its decisions in such matter) is to be regarded as final and conclusive upon the facts in the case of Levy, and consequently that he should be recognized by the Government as a citizen of the United States. 509.

See EXPATRIATION, 1, 2.

CLAIMS.

1. During the late rebellion, T. & Co. contracted with a quartermaster to deliver one thousand mules, at a stated price for each; the quartermaster accepted and paid for twenty-four of the mules, but, deeming a further supply not needed for the service, gave notice to the contractors, who were ready to perform the contract, that he would receive no more mules under the same. The contractors claim from the Government the difference between the expense, in time and money, incurred by them for the performance of the contract, and the value of the mules declined to be received there-

CLAIMS—Continued.

- under by the quartermaster when the notice was given as aforesaid. *Held* that the claim, being one for unliquidated damages, cannot be entertained by the accounting-officers of the Treasury. 24.
2. The papers in the claim of Captain R. H. Wyman for prize-money, presenting, in important particulars, inconsistent and contradictory statements, were returned without an opinion, to the end that the facts upon which the claim is based may be more definitely ascertained before passing upon its merits. 36.
 3. A claim for money expended in defraying the expenses of a delegation of Cherokees visiting the Capital by authority of the Government, in the year 1870, may be allowed out of the appropriation made by the resolution of July 13, 1870, [No. 110.] 55.
 4. An internal-revenue officer, while in pursuit of an escaped prisoner, shot and killed the latter, for which the officer was indicted in a State court, tried, and acquitted; and having sustained a considerable outlay in his defense, he afterward presented at the Treasury a claim against the Government for re-imbursement of the amount: *Advised* that there is no law authorizing the re-imbursement. 71.
 5. By charter-parties made in October, 1862, the steamers General Meigs and General Burnside were hired to the Government, to be used in the military service for the term of six months, commencing from the 15th of that month, at a per diem of \$300 for each, with the privilege of purchase at a stated amount at the end of three months. On the 2d of February, 1863, the Quartermaster-General issued an order to purchase the steamers under the provisions in their charter-parties, the purchase to date as of the 15th of January previous; that order was not finally carried into effect until the 13th of May following, on which day bills of sale, transferring the steamers to the United States, antedated the 15th of January, 1863, were executed and delivered by the owners thereof, who also made out bills for the purchase-money, bearing the date last mentioned, and received payment of the same; the owners furthermore made out bills against the Government for re-imbursement of expenses incurred in running the steamers during the period between the 15th of January and the 13th of May, and received payment thereof. A claim, however, was subsequently presented by them for compensation for the use of the steamers during that period, at the charter-rate of \$300 per diem, deducting the amount already received for re-imbursement of running expenses. *Held* that this claim, under the circumstances, has no validity. 84.
 6. William T. Shirley, while a clerk in the War Department, performed extra services in the years 1865 and 1866, for which he now presents a claim for compensation out of an appropriation made by the act of May 13, 1872, chap. 172, "to enable the Secretary of War to pay for additional clerical services" theretofore employed by him, &c.: *Advised* that payment of the claim is prohibited by the act of August 26, 1842, chap. 202. 101.
 7. Gideon J. Pillow, of Tennessee, having been pardoned by the Presi-

CLAIMS—Continued.

- dent for his participation in the rebellion, filed in the War Department a claim against the Government for mules alleged to have been taken from his plantation in Arkansas, in the year 1862, by the military forces of the United States. *Advised* that the allowance of the claim by the War Department is prohibited by the act of February 21, 1867, chap. 57. 103.
8. The facts and circumstances presented in the claims of C. A. Perry & Co. failing to show that their property was destroyed while in the military service of the United States, either by impressment or contract: *Held* that the claim is not within the provisions of the 2d section of the act of March 3, 1849, chap. 129. 137.
 9. In May, 1861, Simeon Hart, then a resident of New Mexico, delivered commissary stores to the Government at certain military posts in that Territory, for which he received a voucher from the proper officer, but payment thereof was withheld, in consequence of an order issued from the War Department during the same month. Hart subsequently took an active part in the rebellion, but was pardoned by the President in November, 1865. He afterward assigned said voucher to two creditors, loyal persons, by whom payment of the same is now demanded. On a question whether payment is prohibited by the joint resolution of March 2, 1867, [No. 46:] *Held* that the case presented is not within the prohibition of that resolution, the claim having accrued after April 13, 1861. 145.
 10. The *proviso* in that resolution was intended only to make an exception in favor of claims existing prior to April 13, 1861, which had been assigned or agreed to be assigned to loyal citizens of loyal States prior to April 1, 1861, in payment of debts incurred prior to March 1, 1861; it does not relate to claims *additional* to those mentioned in the preceding words of the resolution. *Ibid.*
 11. The Secretary of War is not authorized to pay the claimant, David Quinn, anything in compromise of damages alleged to have been sustained by him in connection with his contract of August 10, 1867, for removing rock at the entrance of Eagle Harbor, Michigan; the authority of the former being restricted to paying for work actually performed by the latter. 183.
 12. Where the payment of a claim against the Government would otherwise come within the prohibition of the joint resolution of March 2, 1867, [No. 46,] the fact that the political disabilities of the claimant, imposed by the third section of the fourteenth amendment of the Constitution, have since been removed by Congress, does not free the claim from the operation of that resolution; the prohibition of payment still continues. 329.
 13. The 1st and 2d sections of the act of March 3, 1849, chap. 139, provide respectively for a separate and distinct class of claims. The two classes there provided for distinguished from each other. 360.
 14. Claims of officers and soldiers for horses lost in the military service, where their horses were in service simply as a part of the equipment belonging to and furnished by them, are allowable only under the provisions of the 1st section. *Ibid.*

CLAIMS—Continued.

15. But where the property was in service by impressment or contract, and not merely by being a part of the equipment furnished by the officer or soldier, such claims are allowable under the provisions of the 2d section, which contains no restrictions as to *persons*. *Ibid*.
16. Horses which constitute a part of the equipment of officers and soldiers, furnished by themselves, are not in the military service by "contract," much less by "impressment," within the meaning of the term as employed in the latter section. *Ibid*.
17. Lieutenant Mansur went on an expedition up the Red River, leaving his horse and saddle behind with the regiment to which he belonged. During his absence the horse and saddle were, by order of the colonel of his regiment, taken and used in the military service without his knowledge and consent, and while so in such service were lost. Claim being made by him for the value of the property under the act of March 3, 1849, chap. 129: *Held* that the case falls within the 2d section, and not the 1st section, of that act. 367.
18. To bring a claim for the loss of a steamboat within section 3483 of the Revised Statutes, it must be shown, 1st, that the boat was in the military service, either by impressment or contract; 2d, that the loss occurred while the boat was actually employed in such service; 3d, that it was caused by an unavoidable accident, and not through any fault or negligence on the part of the owner; 4th, that the case is not one wherein the risk was agreed to be incurred by the owner. 535.
19. Where the question in such a claim is, whether the boat was or was not in the military service by contract, the distinction between a contract which imports the letting of the boat for hire (*locatio rei*) and one importing merely the carriage of goods for hire, (*locatio operis mercium vehendarum*), is material; contracts of the former kind *only* being within the statute. 536.
20. To make out an impressment binding upon the Government, it is essential that there be shown to have existed such an emergency as justified the officer in taking the property; but this, together with an actual taking or what is equivalent thereto, being satisfactorily established by the claimant, nothing more remains to be proven by him under that head. *Ibid*.
21. In June, 1865, the Mobile and Ohio Railroad, being then in the possession of the military authorities of the United States, was, under a general order issued thereby, turned over to the company owning the road, to be worked by such company on its own account, subject to the condition that the company should "carry all Government freight at such tariff as may be established by the Quartermaster-General." Troops and Army stores were subsequently transported over the road, for which service, up to November 1, 1865, payments were made to the company at rates established by the Quartermaster-General, and receipts in full were given by the company therefor without protest. *Held* that no claim is admissible for additional compensation in respect of such service on the ground

CLAIMS—Continued.

that the company was entitled to more than what was paid; the acceptance of the amount allowed by the military authorities, and the receipt given therefor, constituting a final settlement as between the Government and the company. 591.

22. The reference to the "fares and tolls allowed to northern railroads," in the bond given by that company to the United States, dated November 1, 1865, for rolling-stock, &c., purchased from the Government, is to be understood as meaning the fares and tolls allowed by the general regulations of the Quartermaster's Department to railroads in what were known as the "Northern States" in contradistinction to the Southern or former slave States; it does not include railroads in what were called the "border States." 592.

See ACCOUNTS AND ACCOUNTING-OFFICERS, 5; APPROPRIATIONS, 3; ATTORNEY-GENERAL, 10; MEMBERS OF CONGRESS ELECT, 1; OATH.

COLLECTION-DISTRICTS.

See INTERNAL REVENUE, 9.

COMMITTEE OF CONGRESS.

See ATTORNEY-GENERAL, 1, 6, 7.

COMPENSATION.

1. The Missouri River, Fort Scott and Gulf Railroad Company is not entitled to compensation from the Government for transportation performed over the Kansas and Neosha Valley Railroad, notwithstanding there may have been no notice given by the Government to the company, previous to the performance of the transportation, that it was to be done at the latter's expense. 69.
2. Under the act of August 3, 1861, chap. 42, Surgeon-General C. A. Finley was, upon his own application, by an order from the War Department, issued by direction of the President on the 23d of April, 1862, placed upon the retired-list of the Army, to date from April 14, 1862; and, by the same act, any officer retired thereunder was to be allowed "the pay proper of the highest rank held by him at the time of his retirement, whether by staff or regimental commission, and four rations per day," without any other pay, emoluments, or allowances. 76.
3. In enacting that provision, Congress acted on the supposition that the compensation of all officers consisted of what is termed "pay proper" and certain emoluments besides, such as commutation for service rations, &c.; and the limitation of "four rations per day" was designed to operate solely in diminution of those emoluments. *Ibid.*
4. But the compensation of the Surgeon-General consisted of a stated annual salary, without any emoluments of the kind referred to, and the rank held by him, not being assimilated by law to any particular grade in the Army, was indicated only by the title of his office. *Ibid.*

COMPENSATION—Continued.

5. *Held, therefore*, that Surgeon-General Finley became entitled, on his retirement, to the annual salary which he previously received, that being the pay proper of the highest rank held by him, but not to four rations per day in addition thereto, as the allowance of these would be inconsistent with the purpose of the limitation mentioned. *Ibid.*
6. Meaning of the *proviso* in section 4 of the act of July 28, 1866, chap. 293, declaring that "the additional compensation of twenty-five per centum, as now provided by law, shall be continued to officers' as aforesaid [i. e., deputy collectors] at the port of San Francisco," explained. 241.
7. Under that enactment, the deputy collector of customs at San Francisco is absolutely entitled to such additional compensation, and the Secretary of the Treasury cannot, in his discretion, disallow the same. *Ibid.*
8. Where an officer in the civil service of the Government, after having been suspended by the President under the tenure-of-office act of April 5, 1869, chap. 10, was afterward restored to duty, and who, during the period of his suspension, had been employed in settling up his affairs with the Government: *Held* that he could under no circumstances whatever be allowed the salary of the office for the period of his suspension; the statute expressly declaring that no part of such salary shall belong to the suspended officer. 247.
9. Where accounts were presented to the Treasury Department for services rendered by a district attorney during the year 1873, in prosecutions for fines, penalties, and forfeitures for violation of the revenue-laws: *Advised* that they may be paid under the act of March 3, 1873, chap. 244, if the charges therein are deemed just and reasonable by the head of that Department. 384.
10. Where a diplomatic officer, of a class named in the act of June 17, 1874, chap. 294, temporarily absented himself for a period of not over ten days: *Held* that the right to compensation, where the absence is not over ten days, is in no case affected by that act, and that such officer may, accordingly, be allowed compensation for the period of his temporary absence. 534.
11. The provision of the 7th section of the act of July 15, 1870, chap. 295, declaring that thereafter "the increased pay of a promoted officer [of the Navy] shall commence from the date he is to take rank, as stated in his commission," applied to such advancement or promotion in rank, and such only, as entitled the officer advanced or promoted to an increase of pay over what he got at the time his advancement or promotion actually transpired; the words "increased pay," in that provision, being used relatively to the pay he then received. 547.
12. Hence where B., a paymaster in the Navy, was on the 17th of February, 1871, advanced fifteen numbers in his own grade, under the act of January 24, 1865, chap. 19, and received a new commission by which he took rank as a paymaster from October 20, 1864; the

COMPENSATION—Continued.

commission held by him at the time of his advancement giving him rank as paymaster only from May 4, 1866, between which date and October 20, 1864, he had served and been paid as an assistant paymaster: *Held* that the case did not come within the above-mentioned provision, the advancement of B. not involving any increase of pay over what was received by him at the time it happened; and that, accordingly, a claim made by him under that provision for the difference between the pay of an assistant paymaster and the pay of a paymaster for the period between October 20, 1864, and May 4, 1866, is inadmissible. *Ibid.*

13. The provision of the act of March 3, 1873, chap. 226, increasing the pay of certain employes of the Senate and House of Representatives 15 per centum, does not apply to persons employed after the passage of that act; the increase of pay referred to is *pro hac vice* only, and not continuing. 612.

See ATTORNEY-GENERAL, 12; MEMBERS OF CONGRESS ELECT, 2.

COMPROMISE.

See INTERNAL REVENUE, 1, 2, 3.

CONDEMNED NAVAL VESSELS.

See NAVY, 6.

CONDITION.

See GRANT, 7, 8, 9, 10, 11, 12.

CONGRESSIONAL EMPLOYÉS.

See COMPENSATION, 13.

CONGRESSIONAL PRINTER.

1. The 4th section of the act of June 25, 1864, chap. 155, making it the duty of the Superintendent of Public Printing "to cause to be printed, and stitched in paper covers, twenty-five hundred copies of the annual reports of the Executive Departments, for the use of said Departments respectively," is repealed by the provisions of the 3d and 4th sections of the act of May 8, 1872, chap. 140. 201.
2. Hence, a requisition made by the Commissioner of Agriculture, under the 4th section of said act of June 25, 1864, would not authorize the Congressional Printer to print twenty-five hundred copies of the annual report of the former for the use of the Department of Agriculture. *Ibid.*

CONSTITUTIONAL LAW.

See MEMBERS OF CONGRESS ELECT, 3; PRESIDENT, 6, 8.

CONSUL.

See OFFICIAL BOND; SHIPPING, 6.

CONSULAR COURT.

1. In the case of consular courts clothed with criminal jurisdiction, as in the case of other courts invested with similar jurisdiction, the rule applies, that a sentence of imprisonment cannot be legally executed beyond the territorial jurisdiction of the court which pronounced it, unless authority thus to execute the sentence is conferred by the legislature. 522.
2. Hence, in the absence of any law giving power to send the convicts of the consular courts at Smyrna and Constantinople to this country for imprisonment, if such convicts were brought to the United States for that purpose they could not legally be held. *Ibid.*
3. *Seem* that, under present statutory provisions, (see Revised Statutes, sections 4121 to 4125, inclusive,) it is contemplated that the sentences of those courts, pronounced in the exercise of their criminal jurisdiction, are to be executed only in the country where the trial and punishment were had. *Ibid.*

CONTRACT.

1. A mail-contractor, after executing separate contracts in due form to convey the mails on four different routes, entered upon and continued the performance of service on two of them, but on the other two he failed to do any service, and the Post-Office Department was compelled to employ other parties to carry the mails on the last-mentioned routes at an increased rate of compensation, the difference being charged as usual to the first contractor. For administrative purposes merely, and not with any intention to release the first contractor from liability, an order was made to annul the two contracts which he had failed to perform. *Held* that, under the circumstances stated, such contractor was not thereby discharged from any claim growing out of those contracts which the United States would otherwise have against him. 18.
2. Where an alleged oral agreement between a quartermaster and the Danville, Lancaster and Nicholasville Turnpike Company, concerning the use of the road of the latter for military transportation during the late rebellion, was set up by said company as the basis of a rate of compensation above what had already been allowed by the Government for the use of the road: *Held* that, under the operation of the 1st section of the act of June 2, 1862, chap. 93, such agreement was not obligatory upon the Government, and could not be admitted as the foundation of a claim upon it. 227.
3. The Biddle Manufacturing Company contracted with the Government to manufacture a gun, payment therefor to be made in installments as the work progressed, and afterward subcontracted with the South Boston Company for the performance of the work, the latter also to be paid by installments as the work progressed. The former company was in fact an individual only, who subsequently became insolvent and against whom a petition in bankruptcy was then filed. An installment is due from the Government to the Biddle Company, and likewise one from the latter to the

CONTRACT—Continued.

Boston Company, this last debt being a lien on the gun. *Advised* that payment to the Biddle Company be reserved until the questions before the bankruptcy court on said petition are determined; but that the Government can safely and with propriety discharge any lien which has arisen or which may arise in favor of the Boston Company in connection with the fabrication of the gun, until its completion. 424.

4. Where a contract is entered into with a land-grant railroad company for the transportation of troops or military supplies over its road at certain rates, the Quartermaster-General cannot, without such company's consent, make any deduction from those rates as a composition for the relinquishment of any right which the Government may have, under the conditions of the land-grant, to use the road itself for the purpose of transporting the troops and supplies "free from toll or other charge." 592.
5. The contract entered into with the Pacific Mail Steamship Company by the Postmaster-General, on the 27th of August, 1872, under the provisions of the act of June 1, 1872, chap. 256, whereby the former undertook to transport the mails between the United States and China and Japan in American steamships of a certain class and construction, for ten years, commencing on the 1st of October, 1873, is still obligatory upon the Government, in view of the facts and circumstances presented, notwithstanding the failure on the part of the company to have vessels like those specified in the contract ready for use on the date last mentioned. 674.
6. It was not an essential part of the contract that the new vessels should be furnished by that date, if it then satisfactorily appeared that they would be furnished within a reasonable time thereafter; and, taking into consideration the action and conduct of the Government officers, it would not be right, now that the vessels have been completed and offered for inspection, to refuse to receive them into service under the contract merely because they were not furnished at that time; besides, looking at the primary objects of the act of 1872, it would be subordinating these to unimportant matters so to do. 675.

See ATTORNEY-GENERAL, 13, 14; CLAIMS, 5.

COTTON-CLAIMS.

1. The words "lawful owners," as employed in the 5th section of the act of May 18, 1872, chap. 1872, signify such persons as have a legal interest in the proceeds of the cotton or in any portion thereof; that is to say, first, the holders of the absolute legal title to the cotton at the time of its seizure; and, second, those who had possession in a representative capacity, with a lien for services or for advances and expenses. 515.
2. The claimant of a purely equitable interest (i. e., one who can only claim through a trustee, the legal title being in the latter) cannot, in general, be deemed the lawful owner within the meaning of the act. Exceptions hereto indicated. *Ibid*.

COTTON-CLAIMS—Continued.

3. The executors or administrators of deceased lawful owners are their legal representatives; but these may also, under some circumstances, be the heirs or next of kin of such owners. *Ibid.*
4. It is not the duty of the Secretary, under said act, to decide between conflicting claims on equitable grounds alone; and in a contest between a trustee and a beneficiary, the former is entitled to possession where the trust remains unexecuted and possession is necessary to enable him to execute it. *Ibid.*
5. In May, 1863, one H., a resident of Arkansas, being the owner of certain bales of cotton, sold and delivered the same to the Bank of Chattanooga, Tennessee, receiving therefor the price agreed upon. Afterward these bales, (the name of the cashier of the bank being marked thereon,) while in his possession, were unlawfully seized by the agents of the United States, sold, and the proceeds turned into the Treasury. By a law of Tennessee, in force at the time of the sale, banks of that State were prohibited from using or employing any of their moneys in trade or commerce. *Held* that, notwithstanding said law, the purchase was valid as between H. and the bank, and consequently that, as between them, the latter was lawful owner of the cotton when seized. *Ibid.*
6. However, assuming that the purchase in that case, although in the name of the bank, was in fact made by the bank (not with its own funds, but) with the funds of a third party, or with funds belonging to the estate of a decedent, the ownership of the cotton was in the estate or party with whose money it was bought. *Ibid.*
7. The seizure of cotton by an authorized agent of the Treasury Department does not raise a conclusive presumption that the proceeds thereof went into the Treasury. *Ibid.*

COURT-MARTIAL.

See EMPLOYMENT OF COUNSEL; FREEDMEN'S BUREAU, 2; LIMITATIONS, 1, 5.

CRIME.

Where a portion of the crew of the steamer Edgar Stewart forcibly displaced the master thereof from command, and took possession of the vessel: *Held* that this did not constitute the offense of piracy, but of mutiny; that for the latter offense the parties charged are liable to be tried and punished under the laws of the United States; and that they may be tried therefor in any district in which they are first brought. 589.

See ENLISTMENT, 4; LIMITATIONS, 3, 4.

CURRENCY.

1. Provisions of the acts of March 3, 1865, chap. 82; July 12, 1870, chap. 252; and June 20, 1874, chap. 343, examined and considered with reference to the power and duty of the Comptroller of the Currency concerning the distribution of circulating-notes authorized by the national banking-laws. 414.

CURRENCY—Continued.

2. The Comptroller may, consistently with the last-mentioned act, distribute under the act of 1865 such portion as remains unissued of the \$300,000,000 authorized by the national-bank act of June 3, 1864, chap. 106, and under the act of 1870 such portion of the \$54,000,000 authorized thereby as remains unissued. *Ibid.*
3. In the distribution of the \$55,000,000, for which provision is made by the act of 1874, it is the duty of the Comptroller, upon applications duly made, to satisfy the same with reasonable expedition, even to the extent of giving to a State its full apportionment; but of several applications made about the same time, if some are from a State or Territory where the deficiency is relatively great, and others from a State or Territory where it is relatively small, preference should be given to the former, in case the supply is not sufficient for all. *Ibid.*
4. The means of supplying the said \$55,000,000 provided by the act of 1874 is by requisitions upon the national banks in States having an excess of circulation; and the Comptroller can resort to no other sources of supply. 415.
5. In the distribution of the \$55,000,000 of national-bank notes, as provided for by the act of June 20, 1874, chap. 343, the Comptroller of the Currency must rely on requisitions for the withdrawal and redemption of their notes by banks in States where there is an excess of circulation; this is his only resource under that act. Opinion on same subject, given July 15, 1874, (see *ante*, p. 415,) re-affirmed. 456.

CUSTOMS-LAWS.

1. Silk and cotton ribbons, of which silk is the component material of chief value, fall within the last paragraph of the 8th section of the act of June 30, 1864, chap. 171, and are subject to a duty of 50 per cent. *ad valorem*. 130.
2. Under the 22d section of the act of March 2, 1799, chap. 22, in the event of the disability or death of the surveyor, the authority of his deputy to act as such terminates; and the term "disability," as used in that section, is comprehensive enough to embrace any cause whereby the officer becomes no longer capable of discharging the duties of the office, and in this sense it includes the case of a resignation. 260.
3. From January 31, 1873, to April 1, 1873, a vacancy existed in the office of surveyor of the port of New York, during which period B., a deputy surveyor of the same port, performed the duties of the office of surveyor. B. claims so much of the proceeds of fines, penalties, and forfeitures incurred under the customs-laws within that period as would have been distributable to the surveyor had there been no vacancy in the office. *Held* that the claimant does not come within the description of persons to whom distribution of such proceeds is, by the statute, (the 1st section of the act of March 2, 1867, chap. 188,) authorized to be made, and that the claim has, therefore, no validity. 336.

CUSTOMS-LAWS—Continued.

4. If that portion of the proceeds mentioned, for which claim is made by B., remains undistributed, it should be divided equally between the collector and naval officer appointed for the port or district of New York during the period above stated. *Ibid.*
5. The limitation imposed by the 22d section of the act of July 14, 1870, chap. 255, as to the *value* of "household effects" which are exempted from duty thereunder, ceased to be of force when the provision in the 5th section of the act of June 6, 1872, chap. 315, also exempting such articles from duty, took effect; the provision in the latter act wholly superseding that contained in the former act, relative to the exemption of household effects. 386.
6. The prohibition contained in section 19 of the act of June 22, 1874, chap. 391, against compromising or abating any claim of the United States for any fine, penalty, or forfeiture incurred by a violation of the customs-laws, does not apply to such arrangements as are ordinarily made by district attorneys for obtaining the testimony of accomplices in *criminal cases*, whereby an assurance is given to the accomplice, who is to be used as a witness, of exemption from prosecution in case he acts in good faith and makes a full disclosure. 511.
7. The duties imposed by the 1st section of the act of February 8, 1865, chap. 36, accrue on importations made on the day the act was approved. 542.
8. The phrase "from and after the date of the passage of this act," used in that section, and the phrases "from and after the passage," and "on and after the date of the passage," used in the 2d, 4th, 6th, and 8th sections of the same act, were employed simply as equivalents of each other, and are to be understood as identical in meaning and force. *Ibid.*
9. Under section 2971 of the Revised Statutes, the owner of merchandise in public store or bonded warehouse has the right to withdraw it for exportation to a foreign country, whatever may be his object in doing so, or whatever may be the disposition he designs to make of the merchandise after it reaches its foreign destination. 574.
10. So, by section 2979 of the Revised Statutes, the duty of the collector to permit such merchandise to be withdrawn and shipped without payment of duties becomes imperative when the requirements of the statute as to giving security and paying appropriate expenses are complied with by the owner, whatever may be his purpose in withdrawing the merchandise, or whatever he may intend to do with it after its arrival abroad. *Ibid.*
11. After merchandise thus withdrawn and shipped has been landed out of the jurisdiction of the United States, the bond of the owner is discharged, and the merchandise itself acquires a new character relatively to our revenue-laws; and if subsequently re-imported, it stands on the footing of an original importation. *Ibid.*
12. Hence, should goods of the same class or description happen *then* to be exempt from duty, such re-imported merchandise would be equally entitled to exemption therefrom. 575.

CUSTOMS-LAWS—Continued.

13. The second *proviso* in section 3 of the act of March 3, 1875, chap. 127, is amendatory of section 3019 of the Revised Statutes, and must be construed in connection with the latter section, not in connection with the enactment in which it is found; the two, (*i. e.*, the *proviso* and section 3019,) in effect, declaring that ten per centum on the amount of all drawbacks allowed by the statute shall be retained for the use of the United States, provided that of the drawback on refined sugars only one per centum of the amount so allowed shall be retained. 578.
14. Thus construed, that *proviso* unquestionably applies to all refined sugars manufactured from imported sugars, irrespective of the other provisions contained in said act of March 3, 1875. *Ibid.*
15. The provisions of the joint resolution of April 29, 1864, [No. 27,] and of the 20th section of the act of June 30, 1864, chap. 171, taken together, impose the additional duty of fifty per cent. mentioned in the former enactment only on goods imported after April 30, 1864. 653.
16. Goods in warehouse are already "imported" within the meaning of those provisions; and consequently where goods were in warehouse on the 30th of April, 1864, they were not subject to the additional duty. *Ibid.*
17. If such duty has been exacted upon goods which were in warehouse on that date, it is made the duty of the Secretary of the Treasury, by the said 20th section, to refund them. (But see, on this subject, opinion of July 6, 1874; also *infra*, par. 18, 19.) *Ibid.*
18. Re-examination of the 20th section of the act of June 30, 1864, chap. 117, in connection with the joint resolution of April 29, 1864, with reference to the subject of refunding the additional duty mentioned in the latter enactment under the provisions of the former, heretofore considered in opinion of May 27, 1874. (See *ante*, p. 653.) 672.
19. The provision for refunding contained in said 20th section is limited to cases in which such additional duty has been exacted on importations made upon the 29th and 30th of April, 1864; it does not apply to cases where the duty has been exacted on goods which were imported *before* the 29th of April. View on this subject given in opinion of May 27, 1874, cited above, modified as respects the latter cases. *Ibid.*

DAMAGES.

1. Mode of ascertaining damages to property under the act of July 20, 1868, chap. 184, which provides for the right of way over lands needed for the construction of the canal around the Des Moines Rapids of the Mississippi River, stated. 214.
2. Upon the assumption that the pipes through which claimant derived his supply of water were laid and in use on his land before the acquisition of the right of way over the same: *Held* that the direct and probable loss or injury which he would necessarily sustain by the construction of the canal, in being compelled to remove and

DAMAGES—Continued.

relocate them, constituted a proper element of charge, along with the value of the land, in estimating the compensation for such right of way. *Ibid.*

See CLAIMS, 1.

DEPUTY COLLECTOR AT SAN FRANCISCO. *

. See COMPENSATION, 6, 7.

DESERTER.

See LIMITATIONS, 1, 5; SHIPPING, 5, 6; PRESIDENT, 3.

DIPLOMATIC OFFICER.

See COMPENSATION, 10.

DIRECT-TAX LAW.

The purchase of lands sold by the tax-commissioners for taxes, under the direct-tax law, is not within the prohibition of the 8th section of the act of September 2, 1789, chap. 12, which forbids the purchase by certain officers of "public lands or other public property." 352.

"DISABILITY."

See CUSTOMS-LAWS, 2.

DISCHARGE.

See BOUNTY, 3.

DISTRICT ATTORNEY.

See COMPENSATION, 9.

DISTRICT OF COLUMBIA.

1. By section 5' of the act of February 21, 1871, chap. 62, all sessions of the legislative assembly of the District of Columbia, called as well as regular, are limited in duration to sixty days. 1.
2. The board of commissioners created by the act of June 1, 1872, chap. 260, to carry out the provisions of the act of July 25, 1866, chap. 236, and the acts amendatory thereof, authorizing the construction of a jail in and for the District of Columbia, have no power to purchase a site for the jail. 60.
3. By the act of July 25, 1866, the selection of the site therefor was restricted to "a suitable place, on some of the public grounds belonging to the Government." Under that act a site was selected; but afterward, by joint resolution of March 2, 1867, Congress directed a new site to be selected, and this enactment left the restriction imposed by the act of 1866, as to the selection of the site, still in force. *Ibid.*
4. The act of June 1, 1872, contains nothing that enlarges the field of selection which existed previous thereto, or that renders the restriction mentioned inconsistent with its provisions; and though, under it, the board of commissioners may change the site, they cannot locate the same on any other ground than such as is already owned by the Government. *Ibid.*

DISTRICT OF COLUMBIA—Continued.

5. The 15th section of the act of August 6, 1861, chap. 62, was entirely superseded by the act of February 21, 1871, chap. 62, and no longer imposes any duty or confers any authority in regard to providing accommodations for the police force of the District of Columbia, this subject clearly falling within the legislative power given by the latter statute to the legislative assembly of the District. 127.
6. By the 3d section of the act of July 23, 1866, chap. 215, which remains in full force, no valid license for the sale or disposal of intoxicating drinks within the District of Columbia can be issued, without the approval of the Board of Metropolitan Police. 338.
7. The board is bound to act on all licenses duly presented for approval; but it is not required to *approve* every license so presented, though as regards such license a full compliance with the other provisions of the license-laws is shown. 339.
8. The power conferred upon the board is wholly discretionary, and may be exercised by it as the circumstances of each case in its judgment seem to require. *Ibid.*
9. The Commissioners of the District of Columbia have authority, under the act of June 20, 1874, chap. 337, to appoint notaries public in and for the District. 419.
10. The act of June 20, 1874, chap. 337, confers no power upon the sinking-fund commissioners of the District of Columbia, either directly or indirectly, to make the principal and interest of the 3.65 bonds which they are thereby authorized to issue, payable in coin, by expressing on the face of the bonds that the principal and interest thereof will be paid in coin. 445.
11. Their duty, as to the preparation of the bonds, will be discharged in entire conformity with the requirements of the statute, by making them payable in *dollars* simply, without introducing any qualification therein respecting the *kind of money* in which they are to be paid. *Ibid.*
12. The intention of the act, manifestly, is that the principal and interest of such bonds shall be paid in whatever may constitute, when the payment is to be made, *lawful money* of the United States. *Ibid.*
13. The First and Second Comptrollers of the Treasury, sitting as a board of audit under the act of June 20, 1874, chap. 337, are, by the provisions of that act, authorized to allow interest at the rate of six per centum per annum upon that part of the indebtedness of the District of Columbia which purports "to be evidenced and ascertained by certificates of the auditor of the board of public works" of said District. 465.
14. The amendment of the 7th section of the act of June 20, 1874, chap. 337, made by the act of February 20, 1875, chap. 94, supplies by legislative authority, in the particular clause to which it relates, nothing more than what was previously necessary to be supplied by construction, in order to give the clause any meaning or effect whatever, consistent with its obvious purpose; it does not really introduce any modification of the former law, but merely renders the meaning thereof more plain and explicit. 544.

DISTRICT OF COLUMBIA—Continued.

15. Hence the pledge of the faith of the United States, with respect to the payment of the principal and interest of the District of Columbia 3.65 bonds, is not made any more complete thereby, but remains precisely as it was before. *Ibid.*
16. The word "guarantee" does not aptly describe the undertaking of the United States in relation to those bonds; though *practically* such undertaking, when regarded as a security, may be equivalent to an unqualified guarantee; inasmuch as the particular means and sources of revenue by and from which the United States promise to provide for the payment of said bonds, interest and principal, are unquestionably adequate to that end. 545.
17. The bonds of the District of Columbia, which the commissioners of the sinking-fund of the District were authorized to issue by an act of the District legislative assembly, passed June 20, 1872, are not affected by the provisions of the 16th section of the act of March 3, 1875, chap. 162, requiring the destruction by burning of all bonds, sewer-certificates, and other obligations of the cities of Washington and Georgetown and of the District of Columbia, "paid or redeemed," &c.; there not having been such a redemption of the first-mentioned bonds as to require them to be destroyed. 554.
18. Those bonds may be disposed of by the commissioners of the sinking-fund agreeably to the provisions of the aforesaid act of the District legislative assembly, subject to the restriction respecting the sale thereof which is imposed by the 10th section of the act of June 20, 1874, chap. 337. *Ibid.*

See ADVERTISEMENTS, 2; WRIT.

DOMICILE.

See EXPATRIATION, 2, 3.

DRAWBACK.

See CUSTOMS-LAWS, 13, 14.

EIGHT-HOUR LAW.

1. The provisions of the act of June 25, 1868, chap. 72, declaring that eight hours shall constitute a day's work for all laborers, workmen, and mechanics employed by or on behalf of the United States, are not applicable to mechanics, workmen, and laborers who are in the employment of a contractor with the United States. That act was not intended to extend to any others than the immediate employés of the Government. 37.
2. The interpretation of the act of June 25, 1868, chap. 72, commonly called the eight-hour law, given in a former opinion, (see *ante*, p. 37,) re-affirmed. 45.
3. Section 2 of the act of May 18, 1872, chap. 172, relating to the settlement of accounts for the services of laborers, workmen, and mechanics employed by the Government between June 25, 1868, and May 19, 1869, was designed to have a broad and liberal construc-

EIGHT-HOUR LAW—Continued.

tion ; and, interpreted in this wise, its provisions may be taken to include all persons who were thus employed and paid by the day, although they may not come within the description of "laborers, workmen, and mechanics," regarding these words in their more strict signification. 128.

EMINENT DOMAIN.

See DAMAGES, 1, 2.

EMPLOYMENT OF COUNSEL.

The head of the Navy Department cannot, consistently with the provisions of section 17 of the act of June 22, 1870, chap. 150, employ an attorney or counselor at law to conduct proceedings before a naval court-martial. Opinion of Attorney-General Akerman on same subject (13 Opin., 515) examined and concurred in. 13.

ENLISTMENT.

1. Prior to the act of May 15, 1872, chap. 162, the law as to the enlistment of minors in the Army stood thus : 1. Minors above the age of eighteen might lawfully be enlisted without the consent of parents or guardians ; 2. They might lawfully be mustered into service between the ages of sixteen and eighteen *with* the consent of parents or guardians ; 3. They could not be mustered into service under the age of sixteen ; 4. The oath of enlistment was conclusive as to the age of the recruit. 210.
2. That act only so far modified the previous law as to prohibit the enlistment of persons under the age of twenty-one, who have parents or guardians entitled to their custody and control, without the written consent of such parents or guardians, leaving in full force the provision making the oath of enlistment conclusive as to the age of the recruit. *Ibid.*
3. However, in executing the provisions of the 20th section of the act of February 24, 1864, chap. 13, and the 5th section of the act of July 4, 1864, chap. 237, the Secretary of War, upon whom that duty devolves, is not concluded by the oath of enlistment on the question of age. *Ibid.*
4. *Semble* that where a recruit, in taking the oath of enlistment, "knowingly and willingly" swears falsely, he is indictable for perjury under the 13th section of the act of March 3, 1825, chap. 65. *Ibid.*

EXPATRIATION.

1. The declaration in the act of July 27, 1868, chap. 249, that the right of expatriation is "a natural and inherent right of all people," comprehends our own citizens as well as those of other countries ; and where a citizen of the United States emigrates to a foreign country, and there, in the mode provided by its laws, formally renounces his American citizenship with a view to become a citizen or subject of such country, this should be regarded by our Government as an act of expatriation. 295.

EXPATRIATION—Continued.

2. The selection and actual enjoyment of a foreign domicile, with an intent not to return, would not alone constitute expatriation; but where, in addition thereto, there are other acts done by him which import a renunciation of his former citizenship, and a voluntary assumption of the duties of a citizen of the country of his domicile, these, together with the former, might be treated as *presumptively* amounting to expatriation, even without proof of naturalization abroad; though the latter is undoubtedly the highest evidence of expatriation. *Ibid.*
3. Obligations of the Government toward its citizens domiciled in foreign countries, who apparently have no intent to return, and who do not contribute to its support, considered; and likewise what should be regarded as evidence of the absence of an intent to return in such cases. *Ibid.*

EXTRA COMPENSATION.

See CLAIMS, 6.

EXTRADITION.

Where a citizen of Prussia, charged with the commission of a crime in Belgium, and with having thence afterward fled to the United States, was demanded by the German government, for the purpose of trial and punishment, under the extradition treaty between the United States and Prussia of June 16, 1852, which provides for the delivery up of persons who, being charged with certain crimes "committed within the jurisdiction of either party," shall be found within the territories of the other: *Held* that although, by the law of Prussia, the accused might be justiciable in that country for the alleged offense, irrespective of the locality of its commission, yet that under said treaty the *locus delicti* is material, and unless it be within the jurisdiction of the demanding party, the provisions of the treaty do not apply; and that, accordingly, in the present case, as the place where the alleged crime was committed is manifestly not within the jurisdiction of Germany, the accused was not demandable under the treaty. 251.

FEES AND COSTS.

1. *Seem* that by the laws of Texas the defendant in a civil action, which has resulted in his favor, is liable to the officers of the court for so much of the costs of the suit as was incurred in his behalf, but no more. 35.
2. Where, however, the taxation of costs is erroneous or improper, the remedy of the party aggrieved is by motion to the court to retax. *Ibid.*
3. The fees and costs allowable in prosecutions against seamen, charged with any of the offenses enumerated in the act of June 7, 1872, chap 322, are regulated by the act of February 26, 1853, chap. 80. 325.

FEES AND COSTS—Continued.

4. Whether the provisions of the act of 1872, respecting the punishment of the offenses referred to, apply to seamen engaged for service on foreign vessels as well as to those engaged for service on American vessels, is a question that appropriately belongs to the courts having cognizance of such offenses to determine, and their determination should govern the action of the Executive Department of the Government in regard to the allowance of fees and costs, so far as such action depends on the answer to that question. *Ibid.*

FICTITIOUS DATE IN OFFICER'S COMMISSION.

See NAVY, 3.

FINAL SETTLEMENT.

See CLAIMS, 21.

FINES, PENALTIES, AND FORFEITURES.

See CUSTOMS-LAWS, 3, 4, 6; REMISSION OF FINES, PENALTIES, AND FORFEITURES; LIMITATIONS, 4.

FOREIGN COINS.

1. The Secretary of the Treasury is authorized to direct the computations of the values of foreign coins at the custom-houses, when such values are to be expressed in the money of account of the United States, to be made according to the values officially estimated and proclaimed agreeably to the 1st section of the act of March 3, 1873, chap. 268; excepting *only* the sovereign or pound sterling of Great Britain, the value whereof must be computed as the same is fixed by the 2d section of that act. 353. (See, also, *Note*, p. 357.)
2. The designation of the "first day of January," in the 1st section of the act of March 3, 1873, chap. 268, as the time for the performance of the duty, thereby devolved upon the Secretary of the Treasury, of making proclamation of the values of foreign coins annually estimated by the Director of the Mint, is not to be regarded as directory merely, but as a limitation upon the authority of the Secretary; he is authorized and required to make such proclamation at the time designated, and at no other. 382.

See MINT.

FOREIGN MAIL SERVICE.

1. The words "United States mail-packets," as used in the postal convention between the United States and France of March 2, 1857, mean such steamships or vessels, sailing on regularly-appointed days, as are engaged by the United States to carry the mail; they denote the *employment* of the steamship or vessel, not its *nationality*. 564.
2. Hence the steamships of the Hamburg and American Packet Company, which were employed by the Post-Office Department to

FOREIGN MAIL SERVICE—Continued.

carry the mail between the United States and France, either directly or by way of Great Britain, were "United States mail-packets" within the meaning of those words as used in the said postal convention, and their employment for that purpose was consistent with the terms of that convention. *Ibid.*

FORFEITURE.

1. The provisions of the 8th section of the act of June 8, 1872, chap. 335, clearly imply the existence of authority in the Postmaster-General to remit a forfeiture or deduction arising out of a contract for the transportation of the mail; the language of the 266th section of the same act also implies a discretion in that officer to make a deduction or not from the pay of mail-contractors for failure to perform service according to contract; and by the 316th section of the same act the Auditor for the Post-Office Department may mitigate or remit any fine, penalty, or forfeiture arising out of the operations or business of the postal service, with the written consent of the Postmaster-General. 179.
2. Where the agreement with a mail-contractor contains the usual stipulation that "in all cases there is to be a forfeiture of the pay of a trip when the trip is not run," &c.: *Held*, in view of the above provisions, that it is competent to the Postmaster-General to waive the forfeiture thereby provided for, in any case arising upon the agreement, according as it may seem to him just and proper to do so under the particular circumstances of the case. *Ibid.*

FORT READING.

The military post of Fort Reading, in California, is within the operation of the 6th section of the act of June 12, 1858, chap. 156, reserving from sale or pre-emption lands that belong to useless military sites until otherwise ordered by Congress. 244.

FREEDMAN'S SAVINGS AND TRUST COMPANY.

1. Rights, duties, and responsibilities of the commissioners appointed under the 7th section of the act of June 20, 1874, chap. 349, to wind up the business of the Freedman's Savings and Trust Company, considered and commented on. 549.
2. The commissioners thus appointed having become invested with the title to the property of said company and taken upon themselves the performance of their trust, it is not competent to either the board of trustees of said company or the Secretary of the Treasury to accept the resignations of the former, and relieve them from the duties and responsibilities which they have assumed. *Ibid.*

FREEDMEN'S BUREAU.

1. The Commissioner of the Freedmen's Bureau is liable for all losses sustained by the Government through the default of subordinate

FREEDMEN'S BUREAU—Continued.

- disbursing-officers or other persons employed by him in the disbursement of the moneys intrusted to him under the joint resolution of March 29, 1867, [No. 25.] 268.
2. Where a military officer, detailed for duty in that Bureau, has been guilty of misappropriation of money or any violation of the rules and regulations governing disbursing-officers of the Army, he may be tried by court-martial in the same manner as any other such Army officer. 269.
 3. The resolution of March 29, 1867, [No. 25,] was passed for the protection of a particular class of claimants described therein; its specific object being to more effectually secure to such claimants, through the instrumentality of the Freedmen's Bureau, the money due them from the Government, in cases where claims were prosecuted in their behalf by agents or attorneys. 473.
 4. To enable the Freedmen's Bureau to discharge the duty thereby devolved upon it, the checks and certificates issued at the Treasury on the settlement of such claims were required by the resolution to be made payable to the Commissioner of the Bureau. *Ibid.*
 5. The money drawn from the Treasury by the Commissioner upon those checks and certificates was *public money*, and retained that character while it remained in his hands, or until disbursed by him or his subordinates as directed in the resolution. *Ibid.*
 6. By the provisions of the 3d section of the resolution the Commissioner and those of his subordinates who were charged with the duty of paying out this money to the parties entitled to receive it, were subjected, in respect of the custody and disbursement of such money, to the same degree of responsibility and accountability to which a disbursing officer of the Army was subject in respect of the public money in his hands. *Ibid.*
 7. Therefore, the investment in Government securities of the public money in their hands, made by the Commissioner and the chief disbursing-officer of the Bureau, rendered them liable to severe penalties imposed by the acts of August 6, 1846, chap. 90, and June 14, 1866, chap. 122, and to be criminally prosecuted therefor under these acts. *Ibid.*
 8. But though such investment was prohibited by the statutes last referred to, the profits derived therefrom in the shape of interest and premium inured solely to the United States; they were public money, and should have been accounted for by those officers the same as other public money. Neither of them could legally apply these profits to re-imbursing himself for erroneous or double payments made to claimants, or to paying employes of the Bureau extra compensation, &c. *Ibid.*
 9. The approval by the Second Comptroller of the application of the public money to the purposes just mentioned is no protection to the Commissioner and chief disbursing-officer of the Bureau, unless such approval was given by the Comptroller while officially passing on their accounts; in which case the action of the Comptroller

FREEDMEN'S BUREAU—Continued.

would be conclusive until such accounts are re-opened or the settlement thereof set aside on some valid ground, such as fraud, mistake, &c. 474.

10. Those officers, notwithstanding a criminal prosecution against them on account of the aforesaid investment may now be barred by limitations of the statute, remain civilly liable for so much of the public money received by them as has not been lawfully accounted for. *Ibid.*
11. Where public funds were put into the hands of a disbursing-agent of the Freedmen's Bureau for the purpose of paying certain claimants against the Government, of the class designated in the resolution of March 29, 1867, [No. 25,] and the agent, by direction of any such claimant, remitted to the latter the amount of his claim by express or draft: *Held*, 1st, that though this mode of payment is not in conformity with the directions of the statute, yet, if the claimant actually received the money, his claim is discharged; 2d, that in case the amount were sent by express, this, being done at the claimant's request, would also constitute a discharge of the claim; 3d, that in case the amount was sent by draft, the claim still subsists unless the draft has been paid; and the fact that it is yet outstanding is (in view of the provisions of said resolution) immaterial. 485.
12. In the cases mentioned, neither the said agent nor any other officer of the Bureau would seem to incur any special pecuniary liability to the Government in consequence of the action of the agent. *Ibid.*
13. But where the disbursing-agent has remitted funds due claimants to the attorneys of the latter under instructions from such attorneys, given without the knowledge or consent of the claimants, in this case, should the attorneys have failed to pay over the money, the Government would be still liable to the claimants for the amounts due them; and the disbursing-agent would be liable to the Government for the loss it may thus sustain. *Ibid.*
14. The responsibility of the Commissioner of the Freedmen's Bureau would also extend to such loss under the provisions of the aforesaid resolution. *Ibid.*

GRANT.

1. Construction of the act of July 25, 1866, chap. 241, granting lands to the State of Kansas to aid in building the Kansas and Neosho Valley Railroad, which road subsequently came into the ownership of the Missouri River, Fort Scott and Gulf Railroad Company. 69.
2. Consideration of the claims of the "Sioux City and Saint Paul Railroad Company" and the "McGregor and Missouri River Railroad Company," respectively, to the odd-numbered sections of lands at the intersection of their projected roads, under the act of March 12, 1864, chap. 84, granting lands to the State of Iowa to aid in the construction of railways. 157.

GRANT—Continued.

3. It was not the design of that act to authorize the issue of patents for lands lying beyond the point to which either of the roads mentioned, while in the process of construction, should by sections of ten consecutive miles be from time to time completed. *Ibid.*
4. Priority of construction, and not priority of location, gives priority of right under the act; and hence the lands in controversy should be patented for the use of that company which shall first construct its road to the point of intersection with the projected road of the other company, though the latter may have been first located. *Ibid.*
5. The Wisconsin Central Railroad Company is entitled, under the provisions of the act of May 5, 1864, chap. 80, and the joint resolution of June 21, 1866, [No. 53,] to receive patents for the lands coterminous with each section of twenty miles of road north of Steven's Point, duly certified to be completed according to the requirements of said act, without reference to the commencement or construction of the road from Portage City to Steven's Point. 203.
6. The act of June 3, 1856, chap. 43, granting public lands to the State of Wisconsin, to aid in the construction of a railroad "from Saint Croix River or lake to the west end of Lake Superior and to Bayfield," considered and construed. 430.
7. The provision in the 4th section, viz, that if the road mentioned is not completed within ten years "no further sales shall be made, and the land unsold shall revert to the United States," contains two conditions—one affecting the *power to dispose* of the land by the State, and the other affecting the *title* of the State to the land. *Ibid.*
8. By the former, upon the happening of the contingency referred to, (the non-completion of the road within the time limited,) the authority of the State to dispose of the land is *ipso facto* determined. *Ibid.*
9. By the latter, upon the happening of the same contingency, all of the land *then remaining unsold* is to revert to the United States; but whether the title thereto is divested out of the State and revested in the United States immediately upon default in the condition, or whether some act on the part of the United States showing an intention to take advantage of the default is necessary first to be done in order to defeat the title of the State, *quære*. *Ibid.*
10. Authorities touching the operation and effect of conditions-subsequent in legislative grants, together with the doctrine of the common law respecting the operation and effect of such conditions generally, adverted to and commented on. 431.
11. Distinction drawn between a legislative grant upon condition-subsequent and a grant by an individual upon a similar condition, where the common law prevails: thus, in the latter case, the condition cannot be made by the grantor to operate otherwise than in

GRANT—Continued.

subordination to the rule of the common law; while in the former case it may be made to operate contrary to and irrespective of the common-law rule, if that should be thought expedient by the legislature. *Ibid.*

12. The following conclusions accordingly arrived at:

1. The operation of a condition-subsequent in a congressional land-grant does not depend upon the rules of the common law applicable to such conditions, but upon the intention of Congress, as gathered from the language of the grant itself.

2. Hence, whether the non-fulfillment of the condition in the Wisconsin land-grant act of June 3, 1856, *ipso facto* avoids the title of the State to the unsold lands and reverts them in the United States, or whether it merely renders such title voidable and liable to be defeated thereafter when the United States by some act manifest their desire to resume the lands, is purely a question of statutory interpretation.

3. Looking at the whole of that act, and taking into consideration the peculiar features of the grant contained therein, the particular provision in which the said condition is found may reasonably be construed to have the effect, *proprio vigore*, of avoiding the title of the State and of re-uniting the unsold lands to the public domain of the United States immediately upon the non-fulfillment of the condition.

4. Yet, assuming (as is done here, for the purposes of this case) the correct construction of such provision to be that the lands do not, by the non-fulfillment of the condition, *ipso facto* revert to the United States, but that some action on the part of the latter, showing an intention to take advantage of the default, is necessary *besides* in order to re-vest the lands therein, an act of the executive branch of the Government is sufficient for the accomplishment of that result.

5. Such act may consist simply in the promulgation of an order restoring the lands to settlement and to market, which order it is competent to the Secretary of the Interior to issue. *Ibid.* (See *Note*, p. 444.)

13. The rights derived by the South and North Alabama Railroad Company under the act of March 3, 1871, chap. 123, reviving the land-grant act of June 3, 1856, chap. 41, in favor of that company, are subject to all vested interests which had already intervened in favor of the Alabama and Chattanooga Railroad Company under the act of April 10, 1869, chap. 24, reviving the same land-grant act in favor of the latter company. 617.

14. Such a vested interest, at the date of the act of March 3, 1871, had already intervened in favor of the Alabama and Chattanooga Railroad Company as to the public lands lying at the point of intersection of the two roads within the overlapping limits of the same; and hence these lands should (following the practice of the Interior Department in similar cases) be certified to the State in favor of the last-named company solely. *Ibid.*

GRANT—Continued.

15. *Seemle*, however, that under neither of the acts mentioned, including also the act of August 3, 1854, chap. 201, is a certificate required. *Ibid.*
16. Review of the various land-grant acts with reference to the point just adverted to. *Ibid.*
17. Under the Michigan land-grant act of July 3, 1866, chap. 161, in aid of the construction of a ship-canal at Portage Lake, &c., the lands to be selected by the State are not required to be those "nearest" the contemplated line of that improvement, as in the prior land-grant made to the same State by the act of March 3 1865, chap. 102. 636.
18. The right of selection under the former act being only a "float," it could not be *adverse* to the right of any one who, while it remained in that condition, had acquired a legal or equitable right to any specific tract subject, in a general way, to such float. *Ibid.*
19. Reconsideration of the subject of the Portage land-grant, heretofore examined in opinion of March 11, 1874, (see *ante*, p. 637,) upon an amended statement of facts, and questions thereon, subsequently submitted to the Attorney-General. 645.
20. View expressed in that opinion that the lands to be selected by the State of Michigan under the act of July 3, 1866, chap. 161, are not required to be those "nearest" the contemplated line of improvement, re-affirmed. *Ibid.*
21. Selections of lands by the State under that act are subject to the approval of the Secretary of the Interior. *Ibid.*
22. Authority of the Secretary to reject certain selections of the State, and re-instate certain entries of the same lands previously made by private parties, considered. *Ibid.*

GUANO ISLANDS.

Claim of the widow of William H. Parker, under the acts of August 18, 1856, chap. 164, and April 2, 1872, chap. 81, to certain guano islands in the Pacific Ocean, examined, and the following conclusion reached: that claimant has no *derivative title* to the islands under her late husband, and that she is not now in a situation to set up an *original title* thereto in herself. 608.

HEAD OF DEPARTMENT.

See ACCOUNTS AND ACCOUNTING-OFFICERS, 1; ADVERTISEMENTS, 1, 2; ATTORNEY-GENERAL, 14; EMPLOYMENT OF COUNSEL; OATH, 2.

HOUSEHOLD EFFECTS.

See CUSTOMS-LAWS, 5.

IMPRESSMENT.

See ATTORNEY-GENERAL, 11; CLAIMS, 15, 16, 17, 18, 20.

IMPRISONMENT.

See CONSULAR COURT, 1, 2.

INDIAN COUNTRY.

1. Under the provisions of the 20th section of the act of June 30, 1834, chap. 161, as amended by the 2d section of the act of March 3, 1847, chap. 66, and the act of February 13, 1862, chap. 24, and also the provisions of the act of March 15, 1864, chap. 33, the introduction of spirituous liquors into the Indian country is impliedly prohibited, wherever it is not done by authority of the War Department. 290.
2. *Seemle*, therefore, that the authority of that Department touching the introduction of liquors into the Indian country is exclusive. *Ibid*.
3. Review of the legislation of Congress bearing on the question, What is Indian country within the meaning of the Indian intercourse laws? *Ibid*.
4. All reservations west of the Mississippi River which are occupied by Indian tribes, and also all other districts so occupied to which the Indian title has not been extinguished, are Indian country within the meaning of those laws, and remain (to a greater or less extent, according as they lie within a State or a Territory) subject to the provisions thereof. *Ibid*.
5. The effect of the stipulation contained in the 2d article of the treaty with the Cheyenne and Arapahoe Indian tribes of October 28, 1867, is to render it *unlawful* for any persons to enter or reside upon the reservation established by that treaty except those who are authorized so to do by the treaty, and except certain officers, agents, and employes of the Government. 451.
6. Under the provisions of section 2149 of the Revised Statutes, the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, and also the superintendent of Indian affairs, Indian agents, and subagents, may remove from said reservation all persons found thereon contrary to law; and the President is authorized to direct the military force to be employed in effecting their removal. *Ibid*.
7. An order directing the military to be thus employed need not be issued by the President by his own hand; it would be sufficient if issued by the Secretary of War. 452.

INDIANS.

1. By the act of March 2, 1861, chap. 85, authority was given to Secretary of the Treasury to issue to the proper authorities of the Choctaw tribe of Indians, on their requisition, bonds of the United States to the amount of \$250,000 on account of a claim of said tribe against the Government; this authority was, by subsequent legislation, withdrawn from the Secretary before any requisition for the bonds had been made by the tribe; but, by the act of March 3, 1871, chap. 120, Congress authorized the Secretary to issue to the tribe bonds to the amount of \$250,000, as directed by the first-mentioned act. The tribe has since requested the Secretary to issue the bonds, and also to pay interest on the same from March 2, 1861. *Held* that the bonds, being issuable only in virtue

INDIANS—Continued.

of the authority given by the act of 1871, must bear date subsequent to the passage of that act, and that they cannot be made to bear interest from a period anterior to their date; *held further*, that the Secretary is not authorized to pay interest upon the said amount of \$250,000 prior to the date of the bonds which may be issued under that act. 28.

2. The title of the American Board of Commissioners for Foreign Missions to the missionary station within the limits of the Nez Percé Indian reservation, derived under the acts of August 14, 1848, chap. 177, and March 2, 1853, chap. 90, (assuming that a title passed to said board by virtue of those acts,) was then, and has ever since continued to be, subject to the Indian right of occupancy in the Nez Percé tribe of Indians; and until this Indian right is extinguished, the present holder of that title has no right, merely by virtue of such title, to enter upon and take possession of the premises. 568.
3. L., who claimed title to the tract of land included by said station, as assignee of said board, recovered judgment by default in the territorial court in an action to recover possession of the premises brought against an Indian agent occupying the same, and obtained actual possession thereof under a writ issued upon said judgment. *Held* that the judgment determined nothing adverse to the Indian right; that the writ founded on such judgment was ineffectual to give L. legal possession of land to which the Indian right still adheres; and that in entering upon the reservation thereunder he was simply an intruder, and may be summarily removed therefrom in the mode provided by section 2118 of the Revised Statutes. *Ibid.*

See CLAIMS, 3.

INSANE-ASYLUM.

Volunteer soldiers who have become insane within a period of more than three years after their discharge from service may be admitted to the Government Asylum for the Insane in the District of Columbia, whether at the time they became insane they were inmates of any volunteer soldiers' asylum or not. 225.

INTERNAL REVENUE.

1. The Commissioner of Internal Revenue is not authorized by section 102 of the act of July 20, 1868, chap. 186, to compromise cases in which internal-revenue officers are charged with embezzlement under the 16th section of the act of August 6, 1846, chap. 90, the provisions whereof are made applicable to such officers by the internal-revenue law of June 30, 1864, chap. 173. 8.
2. The words "all cases arising under the internal-revenue laws," in the former section, mean those cases wherein the tax-payer, and not the tax-collector, is the party seeking a compromise. *Ibid.*
3. Where an assessor of internal revenue was indicted upon the provisions of section 30, of the act of March 2, 1867, chap. 169, and of

INTERNAL REVENUE—Continued.

- sections 97 and 98 of the act of July 20, 1868, chap. 186, for having entered into a corrupt arrangement with certain distillers to defraud the Government, and before trial proposed terms of compromise to the Commissioner of Internal Revenue, under section 102 of the last-mentioned act: *Held* that the case does not come within the purview of the latter section. 43.
4. The provisions of the 6th section of the act of March 3, 1865, chap. 78, imposing on national banking associations, State banks, or State banking associations, a tax of ten per centum upon the amount of notes of any person, State bank, or State banking association, used for circulation and paid out by them, apply as well to the notes of a State bank or banking association *which are by itself paid out*, as to any others falling within the above description. 97.
 5. The exemption from taxation of five per centum of the outstanding circulation of any bank, association, corporation, company, or person, provided by the 14th section of the said act of March 3, 1865, as amended by section 9 [*bis*] of the act of July 13, 1866, chap. 184, does not relate to the *tax upon notes paid out* which the 6th section of the act of 1865 imposes, but exclusively to the *tax upon circulation* imposed by the 110th section of the act of June 30, 1864, chap. 173, as amended by section 9 of the said act of 1866; and it relieves, to the extent mentioned, from the latter tax only. 98.
 6. Effect of the amendment of the 74th section of the act of July 20, 1868, chap. 186, made by the 31st section of the act of June 6, 1872, chap. 315, in regard to the internal-revenue tax on tobacco, considered. 110.
 7. All tobacco stored in bonded warehouses, and withdrawn for sale or consumption before the 1st of July, 1872, is, notwithstanding that amendment, subject to taxes imposed by the act of July 20, 1868. *Ibid.*
 8. But all tobacco in bonded warehouses on the 1st of July, 1872, and withdrawn after that date for the same purposes, is by virtue of that amendment subject to the tax imposed by the act of June 6, 1872. *Ibid.*
 9. The provision in the 2d section of the act of July 1, 1862, chap. 119, re-adopted by the 7th section of the act of June 30, 1864, chap. 173, limiting the number of internal-revenue collection-districts in any State, is unrepealed by the provision in the act of July 12, 1870, chap. 251, authorizing the President, at his discretion, to "divide the States and Territories respectively into convenient collection-districts, or alter the same," &c. The restriction as to the number of such districts imposed by the former provision is still in force. 215.
 10. The rule that a final decision, upon a knowledge of all the facts, made by an officer authorized to decide on claims against the Government, is not to be re-opened and reviewed by his successors in office, except for the correction of mistakes such as errors in cal-

INTERNAL REVENUE—Continued.

- ulation, &c., re-affirmed, and applied to cases acted upon by the Commissioner of Internal Revenue under the 44th section of the act of June 30, 1864, chap. 173. 275.
11. Where a lot of ale, while still within the brewery in which it was made, was seized under judicial process emanating from a State court as a forfeiture to the State, and is in the custody of the sheriff awaiting the judgment of the court: *Held* that the possession of the sheriff cannot be legally interfered with by internal-revenue or other officers of the United States. 370.
 12. Nor can those officers legally interfere with the sale of such property by the sheriff, in the execution of a judgment of condemnation by the court. *Ibid.*
 13. When, however, the property passes from under the control of the court, and goes again into private hands, it may be dealt with under the internal-revenue laws as such laws provide. *Ibid.*
 14. Hence, in case it is removed from the brewery without the internal-revenue tax thereon being paid, the United States officers may seize it after the sale by the State authorities, and when it passes into the possession of the purchaser, for non-payment of such tax. *Ibid.*
 15. The phrase "State-banking associations" used in the 6th section of the internal-revenue act of March 3, 1865, chap. 78, as amended by the act of July 13, 1866, chap. 184, comprehends not only associations organized under State-banking laws, but associations or partnerships formed by private agreement for the purpose of carrying on the business of banking. 373.
 16. It may also be taken to include a railroad company issuing scrip in the form of currency, where the issue by the company possesses the essential characteristics of a banking operation. *Ibid.*
 17. The tax imposed by the internal-revenue act of June 30, 1864, chap. 173, as amended by the act of July 13, 1866, chap. 184, on the articles enumerated in Schedule C, is payable as well upon the removal of such articles for consumption without sale as upon the removal thereof for sale. 459.
 18. Stamps or stamp-duties come under the provisions of section 3228 of the Revised Statutes, imposing a limitation on claims for the refunding of internal taxes; and hence claims for a refund of money paid for stamps must be presented to the Commissioner of Internal Revenue within two years from the time they have accrued, otherwise they will be barred. 513.
 19. Where a trust-deed was executed to secure certain bonds, and duly stamped and delivered, but the bonds not having been issued as contemplated, the deed was subsequently canceled, and in lieu thereof a new trust-deed and bonds of another description were thereupon executed and delivered: *Held* that the case of the first-mentioned deed is within the provisions of section 3426 of the Revised Statutes, and presents a case for allowance by the Commissioner, unless barred by section 3228. *Ibid.*

INTERNAL REVENUE—Continued.

20. An application filed with the Commissioner of Internal Revenue for the refunding of taxes alleged to have been erroneously or illegally assessed and collected, though informal or defective, may nevertheless be regarded as a "claim" within the meaning of section 44 of the act of June 6, 1872, chap. 315, so far, at least, as to be the foundation for an *amendment*. 615.
21. Where the application is delivered to a collector or other local internal-revenue officer, it is not a presentation of the claim to the Commissioner such as is contemplated in the first *proviso* of that section. *Ibid.*
22. Under the internal-revenue act of June 30, 1864, chapter 173, section 120, money earned and received by a bank during any one of the four years beginning with April 1, 1864, and added to its surplus or contingent funds, either actually (*i. e.*, at periods having intervals of less than six months) or by construction of law, (*i. e.*, once in six months,) remained liable to the five-per-centum tax imposed by said section, notwithstanding that subsequently an equivalent amount of money was stolen from the bank by one of its officers. 643.
23. But where the money earned and received was stolen and lost, either before having been actually added to the surplus, or before the expiration of the six months, the case is one entitled to relief. *Ibid.*

INTERNATIONAL EXHIBITION.

The property of exhibitors at the International Exhibition at Philadelphia, in 1876, will not be liable to seizure for any debts, claims, or demands whatsoever against the Centennial Commission, or against any other corporate body, person, or association of persons connected with said exhibition. 503.

INVALID SOLDIERS.

1. The act of March 22, 1867, chap. 4, authorizing the Secretary of War to furnish each invalid soldier who is an inmate of any regularly-constituted soldiers' home with one complete suit of clothing, does not extend to those invalid soldiers who are inmates of the National Asylum for Disabled Volunteers or its branches. 14.
2. The clothing thus authorized to be distributed is required, by the terms of the act, to be taken from the "stock on hand," at the time of its passage, and the managers of any such soldiers' home may make requisitions therefor as long as that particular stock lasts, but no longer. *Ibid.*
3. By the act of May 28, 1872, chap. 228, entitled "An act to provide for furnishing trusses to disabled soldiers," Congress designed to furnish soldiers of the Union Army, who were ruptured while in the line of duty, with the best truss that could be procured; but left it discretionary with the Surgeon-General to adopt one style, or different styles, always keeping in view, however, the selection of that which in his judgment is best adapted to the particular case for which it is intended. 72.

IOWA.

See GRANT, 2.

JURISDICTION.

1. Civilian employ  es serving with the Army, in the Indian country, during offensive or defensive operations against the Indians, are subject to military jurisdiction and trial by court-martial, under the provisions of the 60th Article of War, (2 Stat., 366.) 22.
2. It is within the competency of a military commission to try such of the prisoners taken in the Modoc Indian war of 1873 as are chargeable with offenses against the recognized laws and usages of war, and, if found guilty, to subject them to the punishment which those laws and usages warrant. 249.
3. The United States have over lands within a State held for national cemeteries or other public purposes, which were acquired by the former without the consent of the State, or over which the latter has not ceded its jurisdiction, only such jurisdiction as they have over other parts of the State wherein they possess no proprietary interests. 557.
4. The mere ownership of the land does not put the United States in a different position, as regards the matter of jurisdiction over it, than they occupied previous to its acquisition; nor is the situation of the State, with reference to the same matter, in any degree altered thereby. *Ibid.*
5. Strictly speaking, therefore, where the United States own land situated within the limits of a State, but over which they have not acquired jurisdiction from the State, they cannot be said to have any local jurisdiction over such land. *Ibid.*

See EXTRADITION; RESERVATIONS, MILITARY, 1; STATE TAXES.

KANSAS.

See GRANT, 1.

LAND-GRANT ACTS.

See GRANT.

LAND-GRANT ROADS.

1. The prohibition in the act of June 16, 1874, chap. 285, forbidding payment for the transportation of troops or property of the United States over any railroad which, in whole or in part, was constructed by the aid of a grant of public land, on condition that such railroad should be a public highway for the use of the Government, &c., is applicable to so much of the road as lies between the termini thereof which existed at the time the grant was made. Extensions subsequently made beyond either terminus, as well as leased roads, &c., are not affected by the prohibition. 428.
2. Provision in the act of June 16, 1874, chap. 285, prohibiting payment of any part of the money appropriated by that act for transportation of property or troops of the United States over any railroad constructed by the aid of a grant of public land on the particular

LAND-GRANT ROADS—Continued.

condition therein referred to, or "upon any other conditions for the use of such road for such transportation," examined and explained. 663.

3. The prohibition alluded to applies to railroads whose land-grants are conditioned for a *preference* in transportation, or for *ordinary* rates of transportation, or for *average* rates, &c., where such service is required by the Government, as well as to railroads whose land-grants contain a condition in favor of the Government (like the one mentioned in said provision) for *free transportation*. *Ibid.*
4. But it is inapplicable to railroads in whose land-grants no conditions for the use of such roads by the Government appear. *Ibid.*

See COMPENSATION, 1; CONTRACT, 4; GRANT, 1, 2, 5, 13, 14; PACIFIC RAILROADS.

LANDS, PUBLIC.

1. It is within the competency of the Land Department of the Government to determine whether the Roman Catholic Mission of Saint James has acquired title to the land claimed by the latter at Fort Vancouver, Washington Territory, under the 1st section of the act of August 14, 1848, chap. 177. 12.
2. Section 13 of the act of March 3, 1851, chap. 41, to ascertain and settle private land-claims in California, directs the issue of a patent by the General Land-Office only where the claim has been finally confirmed as therein stated, and thus in effect withholds authority to issue one where the claim has never been before the commission constituted by that act. 39.
3. Accordingly, where it appeared that an applicant for a patent for the island of Yerba Buena, claiming title thereto under a Mexican grant, had never presented his claim to said commission: *Held* that this circumstance alone furnished sufficient ground on which to deny his application. *Ibid.*
4. Selections of the public lands, made by the State of California under the 12th section of the act of March 3, 1853, chap. 145, required the approval of the Secretary of the Interior before title passed from the United States to the State by the grant therein contained. 50.
5. Under the act of July 23, 1866, chap. 219, selections theretofore made by the State, and disposed of in good faith under the laws of the State, are not confirmed, nor does the title pass until the lands are certified over to the State by the Commissioner of the General Land-Office. *Ibid.*
6. Hence, where the President in 1866 and 1867 reserved for light-house purposes a piece of land in California which had previously been selected by the authorities of that State under the 12th section of the act of March 3, 1853, and by them granted to a private party in accordance with the laws of the State, but the selection has never received the approval of the Secretary of the Interior, nor has the land ever been certified over to the State by the Commissioner of the General Land-Office: *Held* that the legal title to the premises is still in the United States. *Ibid.*

LANDS, PUBLIC—Continued.

7. The terms "valuable mineral deposits," used in the act of May 10, 1872, chap. 152, to promote the development of the mining resources of the United States, include diamonds; and the title to public lands containing these minerals may, accordingly, be acquired by individuals or associations under the provisions of that act. 115.
8. In the absence of authority conferred either by treaty or by statutory provision, it is not competent to the Secretary of the Interior to set apart any portion of the public domain for the purpose of an Indian reservation. 181.

See SUSPENDED LAND-ENTRIES.

LIMITATIONS.

1. The two-years' limitation prescribed by the 88th article of war applies to all offenses triable and punishable by court-martial, including those which may be thus tried and punished under the act of March 2, 1863, chap. 67. 52.
2. The concealment of an offense by the accused is not a "manifest impediment" to his prosecution, within the meaning of that article, and does not prevent the limitation from running in his favor. *Ibid.*
3. Section 3 of the act of March 2, 1863, chap. 67, to prevent and punish frauds upon the Government, contemplates two proceedings, one civil and the other criminal; of which the former is subject to the limitation prescribed by the 7th section of that act, and the latter to that prescribed by the 32d section of the act of April 30, 1790, chap. 9. 54.
4. The various statutes passed by Congress, applicable to civil and criminal proceedings under the internal-revenue laws, reviewed, and the following result reached:
 1. That the 3d section of the act of March 26, 1804, chap. 40, furnishes the law of limitation as to all *criminal proceedings* under the internal-revenue acts, the period within which such proceedings must be commenced being five years.
 2. That the same section perhaps, or, if not, then certainly the 4th section of the act of February 28, 1839, chap. 36, furnishes the law of limitation as to all proceedings for the recovery of *finer, penalties, and forfeitures* under the internal-revenue acts—the period being the same under either section, namely, five years. 81.
5. Where a soldier belonging to the Ninth Regiment of Infantry deserted on the 19th of September, 1870, but in about one year afterward re-enlisted, under an *alias*, in the Sixth Regiment of Infantry, and (he having subsequently acknowledged that he was a deserter from the former regiment) an order was issued on the 11th of March, 1873, for his trial by a court-martial for desertion, of which offense he was thereupon tried by the court, convicted, and sentenced to punishment: *Held* that the prosecution was barred by the two years' limitation prescribed by the 88th article of war, and that, consequently, the conviction and sentence of the court are void. 265.

LIMITATIONS—Continued.

6. "Manifest impediment," as used in that article, does not mean merely want of evidence, or ignorance as to the offender or offense by the military authorities; but it means something akin to absence—want of power or a physical inability to bring the party charged to trial. 266.

LOUISVILLE AND PORTLAND CANAL.

See APPROPRIATIONS, 5.

MAIL CONTRACTS AND CONTRACTORS.

See CONTRACT, 1, 5; FORFEITURE; POSTAL LAWS, 9, 13, 20, 21, 22.

"MANIFEST IMPEDIMENT."

See LIMITATIONS, 2, 6.

MARSHAL.

See TRAVELING-ALLOWANCES, 3, 4, 5; WRIT, 2.

MEMBERS OF CONGRESS-ELECT.

1. By the act of July 11, 1864, chap. 119, a member of Congress-elect is, previous to as well as after taking the oath of office, debarred from acting as counsel for parties, and from prosecuting claims against the Government, before any Department, court-martial, bureau, officer, or any civil, naval, or military commission, if he has received or has agreed to receive any compensation whatever, directly or indirectly, therefor. 133.
2. H., while acting as counsel of the United States before the joint commission between the United States and Great Britain, under an appointment by the President, was elected a Representative to the Forty-third Congress, the term whereof began on the 4th of March, 1873. On the 3d of March, 1873, an act was passed authorizing the President to continue him in his employment as such counsel, notwithstanding his election as aforesaid, until he should take the oath of office as a Representative in Congress. H. took the oath of office as a Representative December 1, 1873, up to which date he was continued in employment as counsel, and he received compensation for his services as such for the period between that date and the 4th of March, 1873. Question being raised whether he is entitled to receive also the salary of a member of Congress for the same period: *Held* that he is so entitled—that he is not affected by the prohibition contained in the 1st section of the act of September 30, 1850, chap. 90, against paying to one individual the salaries of two different offices. 406.
3. A Representative-elect does not become a member of the House, within the meaning of section 6, Article I, of the Constitution, until he is sworn in as such; and hence he may, till then, lawfully hold office under the United States. *Ibid.*

MICHIGAN.

See GRANT, 17, 20.

MILEAGE.

See TRAVELING-ALLOWANCES.

MILITARY JURISDICTION.

See JURISDICTION, 1, 2.

MILITIA.

1. The laws of Congress upon the subject of arming the militia reviewed and considered with reference to the question, "Whether, under existing laws, the right of property in the arms issued for arming the militia of the United States is vested in the State authorities, with power to dispose of them by sale or otherwise without accounting to the United States;" and *held* that the States do not, by the existing laws, have an absolute right of property in such arms, and that they derive no authority therefrom to sell or dispose of them at pleasure. 490.
2. The arms transmitted to the States under those laws (which are embodied in sections 1661, 1667, and 1670 of the Revised Statutes) are, in contemplation of the provisions thereof, to be held by the States for a specific purpose only, which is pointed out therein; hence they become invested with nothing more than a qualified property in such arms; and they cannot, as a matter of right, and without interfering with the regulations of Congress on a subject over which its authority is paramount, make any disposition or use of such arms which defeats the purpose referred to. *Ibid.*
3. Yet those laws make no provision for any accountability to the United States respecting the disposition of the arms after they are once delivered to the State authorities; Congress having seen fit to leave it entirely to the good faith of the States, when the delivery takes place, to carry out the purpose contemplated in furnishing the arms. *Ibid.*
4. The governor of Virginia having made a requisition upon the Chief of Ordnance for a certain number of revolvers, to be drawn as part of the quota of that State, the latter officer gave to an agent of the State an order for the revolvers upon the manufacturer, which the agent, acting under the directions of the governor, assigned to certain parties in New York in part payment for camp-equipage furnished the State, with the understanding that the delivery of the revolvers by the manufacturer should be made directly to them. But the Chief of Ordnance, on being informed of this transaction, directed the delivery by the manufacturer to said parties, on the order, to be withheld. *Advised* that it was very proper for the Chief of Ordnance to withhold the delivery of the arms to the assignees of the order, as he could not, under the laws mentioned, recognize any right *in them* to the arms; but that the arms cannot be indefinitely withheld from the State, the statute requiring the distribution to be made annually. *Ibid.*

MINT.

Coins cannot be struck at the United States Mint for foreign governments, of such standards and devices as those governments may adopt; there being no authority given by statute to employ the Mint for that purpose. 219.

MISSION OF SAINT JAMES.

See LANDS, PUBLIC, 1.

MISSOURI.

See PRIVATE LAND-CLAIMS, 2, 3.

MODOC INDIAN PRISONERS.

See JURISDICTION, 2.

MOIETIES, DISTRIBUTION OF.

A suit was instituted against a firm to recover a penalty for an alleged violation of the 1st section of the act of March 3, 1863, chap. 76, and while it was pending other violations of the same section by the firm were discovered; whereupon, to avoid further litigation, the firm sought to compromise the whole matter with the Government, and a compromise was finally agreed upon, embracing not only the claim on which suit had been brought, but claims in respect of the violations of law last above mentioned. By the terms of the compromise the Government was to release the latter claims, and the firm was to consent to the entry of a judgment for a certain amount in said suit. The compromise was carried into effect, and the amount of the judgment paid. On a question between adverse claimants of the "moieties" of the fund belonging to the collector and naval officer: *Held* that, in determining the rights of the respective claimants, (some of whom were in office when the suit was commenced, but went out before the subsequent violations of the statute were discovered; others came into office when the former retired therefrom, and remained in until after the compromise was effected,) all of the liabilities in discharge of which the money was actually paid should be taken into account; that the shares of the collector and naval officer, distributable out of the money, may be divided among the respective claimants; and that the division may be based on the computations or estimates, in the various claims against the firm, with reference to which the amount paid was agreed upon in the compromise. 377.

MONEY PAID INTO UNITED STATES COURTS.

1. The act of March 24, 1871, chap. 2, does not repeal the laws previously in force relating to moneys paid into the courts of the United States, or received by the officers thereof, which are of a *special* character and apply only to moneys thus paid or received in particular classes of cases, as proceedings in prize and bankruptcy proceedings; it repeals merely the *general* law on the subject, as embodied in the two statutes mentioned in the 6th section. 362.

MONEY PAID INTO UNITED STATES COURTS—Continued.

2. Accordingly, the disposition of moneys paid into the United States courts, or received by the officers of such courts, in bankruptcy proceedings, is governed since the act of 1871, as it was prior thereto, by the provisions of the bankruptcy acts and the rules prescribed in pursuance thereof. *Ibid.*
3. *Seem* that there is no law making it the duty of the assistant treasurers, with whom moneys are deposited under the provisions of the act of 1871, to keep a detailed account in respect of the causes to which the deposited moneys appertain. 363.

MONEY-ORDERS.

1. Provisions of the act of June 8, 1872, chap. 335, relating to the issue of money-orders by the Post-Office Department, cited and commented on. 119.
2. *Seem* that Congress designed to give these orders, in some respects, the character of ordinary negotiable instruments, to the end that they might be received with full credit, and their usefulness, in a business point of view, be thus promoted. *Ibid.*
3. The statute does not contemplate that the remitter of the order shall be at liberty to revoke it, and demand back his money, against the will of the payee, after it comes into the possession of the latter; since, to enable the former to obtain a repayment of the funds deposited, he must produce the order. *Ibid.*
4. The payee of the order, upon complying with the requirements of the law and of the regulations of the Post-Office Department, is entitled to payment of the money on demand; and the remitter of the order cannot, previous to its being paid, by any notice that he may give to the office at which it is payable, forbid the payment thereof to the payee. *Ibid.*

MONTANA.

1. Under an act of the legislature of Montana Territory of February 11, 1874, providing for the submission to the qualified voters there of the question as to a change of the territorial seat of government from Virginia City to Helena, an election was held on the 3d of August following, the returns of which, according to the official canvass of the votes, (which was required to be made by the secretary and marshal of the Territory, in the presence of the governor,) showed a majority against the change. Application having subsequently been made for a recanvass of the votes: *Held* that, whether the secretary and marshal *together* might, or might not, under the particular circumstances of the case, recanvass the votes, (on which no opinion is expressed,) a recanvass made by one of those officers alone, as was proposed, would not satisfy the requirements of the act mentioned; *yet, held further*, that the legal questions involved—either as regards the discharge of the duties of the canvassing-officers, the validity of the canvass of the votes as made and certified by them, or the final ascertainment of the fact whether a majority of the votes cast was in

MONTANA—Continued.

- favor of, or against the removal of the capital—are of purely local concern, in which the General Government is not interested, and over which its Departments have no jurisdiction or control. 462.
2. Such questions may, by appropriate proceedings, be brought before the courts of the Territory, to which their determination rightfully belongs. *Ibid.*

NATIONAL ASYLUM FOR DISABLED VOLUNTEER SOLDIERS.

See INVALID SOLDIERS, 1.

NATIONAL BANKS.

National banks with a capital of \$50,000 may (notwithstanding the *proviso* in the 4th section of the act of 1874) still be organized, as heretofore, upon a deposit of \$30,000 in bonds, and those with a capital of not less than \$150,000 upon a deposit of one-third of their capital stock in bonds. 415.

See CURRENCY, 1, 2, 4, 5.

NATIONALITY.

See CITIZENSHIP.

NATURALIZATION-LAWS.

See CITIZENSHIP, 7, 8.

NAVIGATION.

1. So much of article 30 of the treaty between the United States and Great Britain, of the 8th of May, 1871, called the Treaty of Washington, as relates to the transportation of merchandise in British vessels, without payment of duty, from one port or place within the territory of the United States to another port or place within the same territory, examined and construed. 310.
2. Under the provisions of that article a British vessel may, during a single voyage, ship merchandise at two or more ports of the United States in succession on the river Saint Lawrence, the Great Lakes, and the rivers connecting the same—the merchandise being destined for other ports of the United States, and to be carried part of the way through Canada by land, in bond—and after thus completing her cargo sail to the port or place in Canada where the land-carriage is to begin. *Ibid.*
3. Such vessel may also, after taking a cargo of merchandise aboard at a Canadian port, to which the same had been transported from a port of the United States part of the way overland in bond and part of the way by water in the manner above indicated, sail thence to two or more ports of the United States on the above-mentioned waters, in succession, during a single voyage, and deliver at each port whatever part of the cargo is consigned thereto. *Ibid.*

NAVIGATION—Continued.

4. By virtue of the 2d article of the treaty with Sweden of April 3, 1783, and the 8th and 17th articles of the treaty with Sweden and Norway of July 24, 1827, the provisions of article 4 of the treaty with Belgium of July 17, 1858, exempting steam-vessels of the United States and of Belgium, engaged in regular navigation between their respective countries, from the payment of duties of tonnage, anchorage, buoys, and light-houses, became immediately applicable, *mutatis mutandis*, to steam-navigation between the United States and Sweden and Norway. 468.
5. Hence, since the 17th of July, 1858, the steamers of the Norse American line, (being Swedish and Norwegian vessels,) plying regularly between Norway and the United States, have not been liable to the payment of the above-mentioned duties at American ports; and the owners thereof are entitled to have refunded to them any moneys they have paid to the customs-officers of the United States for such duties subsequent to that date. *Ibid.*
6. Under sections 3012½ and 3013 of the Revised Statutes, the Secretary of the Treasury has authority to refund to the owners such moneys, where the payments by them to the customs-officers were exacted since the 30th of June, 1864. Where the payments were exacted prior to that date, whether these can be refunded in like manner depends upon the law as it then stood, and the practice of the Treasury Department; section 2 of the act of March 3, 1839, chap. 82, being applicable thereto. *Ibid.*

NAVY.

1. The construction given by the Navy Department to the 3d section of the act of March 2, 1867, chap. 174, "to amend certain acts in relation to the Navy," which requires officers transferred from the volunteer to the regular Navy to be credited with their previous sea-service, concurred in; namely, that to entitle an officer to credit for sea-service thereunder he must have been in the volunteer Navy at the time of his appointment to the regular Navy, and that where he had ceased to be an officer in the volunteer Navy prior to such appointment, however brief the interval, he does not come within the provision referred to. 142.
2. Neither the provisions of the act of July 25, 1866, chap. 231, nor those of the act of March 2, 1867, chap. 174, afford any ground for the claim that the officers selected from the volunteer naval service for appointment in the regular Navy, under the former act, should be commissioned as of the date of that act, or take rank in the regular Navy from the date thereof. 191.
3. Where a fictitious date in an officer's commission would be attended with prejudice to other officers in the same grade, it must be deemed improper to thus date the commission, unless there is clear authority of law for so doing. 192.
4. Effect of the said act of 1867, relative to crediting the officers selected and appointed as aforesaid with the sea-service performed by them while volunteer officers, considered. *Ibid.*

NAVY—Continued.

5. The provision in the 3d section of the act of March 2, 1867, chap. 174, declaring that transferred officers from the volunteer to the regular naval service, by whom sea-service has been performed as volunteers, "shall receive all the benefits of such duty in the same manner as if they had been, during said service, in the Regular Navy," is to be understood to mean that they shall receive whatever benefits their past sea-duty would entitle them to, if, during the period of its performance, they had belonged to the regular naval service, holding (not the same grades as those to which they are transferred, but) grades corresponding to those at that period held by them in the volunteer naval service. Intention of that provision explained. 358.
6. The Secretary of the Navy cannot exchange a vessel belonging to the Navy, which has been condemned as unfit for naval purposes, for another vessel, notwithstanding the exchange might be of advantage to the public service. The disposition of such vessel is controlled by the 2d section of the act of May 23, 1872, chap. 195. 369.
See COMPENSATION, 11, 12.

NAVY PENSION-FUND.

See PRIZE, DISTRIBUTION OF, 3.

NEBRASKA.

1. The State of Nebraska is not entitled, under section 12 of the act of April 19, 1864, chap. 59, (which provides that five per centum of the proceeds of the sales of all public lands lying within said State, which have been or shall be sold by the United States prior or subsequent to the admission of said State into the Union, &c., shall be paid to said State for the support of common schools,) to five per centum upon the value of the lands within that State which have been reserved by the United States for the occupancy of Indian tribes. 666.
2. The 13th section of the same act, declaring that "the laws of the United States, not locally inapplicable, shall have the same force and effect in said State as elsewhere in the United States," does not extend the provisions of the 2d section of the act of March 3, 1857, chap. 104, to that State; nor, as it would seem, do the provisions of the latter section extend to that State *proprio vigore*. *Ibid*.
3. But even assuming the contrary of this, and that the State of Nebraska (in one or other of the modes indicated) is entitled to participate in the benefits of said act of 1857, it, nevertheless, has no right to an account of lands within its boundary which are included in reservations to Indian tribes. *Ibid*.
4. Distinction between the meaning and applicability of the terms "permanent reservations," as used in the act of 1857, and the meaning and applicability of the term "reservation," as used in the act of March 2, 1855, chap. 139, pointed out. *Ibid*.

NEUTRALITY ACT.

After examination of the papers submitted in the case of the steamer "Virginus," and upon consideration of the information furnished thereby: *Advised* that the facts presented do not establish any breach of the neutrality laws, either by the owner of the steamer or by the persons engaged thereon. 49.

NEW MEXICO.

Where two bodies claimed to be the house of representatives of the Territory of New Mexico, and the secretary of the Territory desired instructions as to which of these bodies he should pay: *Advised* that, in view of the imperfect statement of facts furnished, nothing be done which might be regarded as a recognition of the legality of either of the bodies referred to, and that the secretary be informed that no instructions such as he desires can be given without more complete information. 4.

See PRIVATE LAND-CLAIMS, 7.

OATH.

1. *Seem* that whenever the law makes it the duty of an officer to examine, adjust, and settle claims against the Government, he is impliedly given authority to require such claims to be supported by the oaths of witnesses, where the facts necessary to establish them rest on testimony. 419.
2. The act of February 14, 1871, chap. 51, assumes the existence of authority in heads of Departments and Bureaus to require oaths in cases of claims against the Government, and provides them with a very efficient means for enforcing it. 420.

OFFICER.

1. A collector of customs is under no disability, by reason of his office, to contract with the Government for carrying the mail in steamboats between two or more ports within the United States. 388.
2. Sections 1781 and 1782 of the Revised Statutes make it illegal for an officer of the United States to have that sort of connection with a Government contract which an agent, attorney, or solicitor assumes when he procures, or aids in procuring, such contract for another, or when he prosecutes for another any claim against the Government founded thereon. 482.
3. But there is in the statutes no general provision whereby officers of the executive branch of the Government are forbidden to contract directly with the Government as principals, in matters separate from their offices and in no way connected with the performance of their official duties; nor are those officers forbidden to be connected with such contracts, after they are procured, by acquiring an interest therein. 483.
4. There is no prohibition against pension-agents contracting directly with the Government, or becoming connected with Government contracts, in the manner just adverted to. *Ibid.*

See DIRECT-TAX LAW; OATH; RESIGNATION.

OFFICIAL BOND.

1. A consul's bond, given under the 13th section of the act of August 18, 1856, chap. 127, speaks and takes effect (not from its date, but) from the time of its approval by the Secretary of State. 7.
2. Accordingly, where an appointee to a consulship was commissioned on the 18th of January, and his bond, though dated on the 13th of same month, was not approved by the Secretary until the 27th : *Held* that the bond was valid and sufficient under said act. *Ibid.*

ORAL AGREEMENT.

See CONTRACT, 2.

PACIFIC RAILROADS.

1. The act of July 2, 1864, chap. 216, being in express terms amendatory of the act of July 1, 1862, chap. 120, incorporating the Union Pacific Railroad Company, both these acts constitute in legal contemplation but one statute, and are to be read and construed together as such. 232.
2. Regarding them in that light, the requirement contained in the former, that "one-half of the compensation for services rendered for the Government" by that company should be applied to the payment of the bonds issued by the Government thereto, embraces not only railroad and telegraph service, but bridge service also. 233.
3. The 2d section of the act of March 3, 1873, chap. 266, extends to the road of the same company over the bridge at Omaha; and when the circumstances exist which bring it into operation—viz, payment of interest by the Government and failure to re-imburse by the company—all compensation on account of freight and transportation over the bridge is to be withheld; but when those circumstances do not exist, the provision in the act of 1864, requiring a reservation of one-half compensation, becomes applicable to such service. *Ibid.*
4. Accordingly, one-half of the compensation for transportation performed for the Government by said company over its bridge at Omaha should be withheld and applied to the payment of the bonds issued by the Government to the company, except in the case provided for by the 2d section of the act of 1873, when all compensation for such service must be withheld. *Ibid.*
5. The Secretary of the Treasury has authority, under the 2d section of the act of March 3, 1873, chap. 226, to withhold payments for transportation services rendered by the Sioux City and Pacific Railroad Company to the United States over the Fremont, Elkhorn and Missouri Valley Railroad, a road *leased* by that company, in case of default on the part of the company to re-imburse the Government for interest paid upon the bonds of the United States issued thereto. 375.

See PRESIDENT, 10; TELEGRAPH, 5, 6, 10, 11.

PARDON.

1. Applications for pardon are addressed to the President, who may act on them upon his own examination simply, or, before acting thereon, may refer them to any of the Executive Departments for advice. 20.
2. An application having been, with that view, referred by the President to the Secretary of War, and the latter having afterward submitted the same to the Attorney-General for his opinion thereon, the Attorney-General declined to give an opinion on the ground that to do so would be merely to advise the Secretary as to what he should advise the President. *Ibid.*
3. Where a person convicted of a crime against the United States was sentenced to fine and imprisonment, and subsequently received an unconditional pardon from the President, but previous thereto had paid the amount of the fine to the marshal, by whom it was deposited in court, where it still remains: *Held* that the fine was remitted by the pardon, and that the money should now be restored to the person pardoned. 599.
4. A pardon by the President works a remission of a pecuniary penalty already paid, unless the money has actually passed into the Treasury, (overruling the decision in 10 Opin., 1.) *Ibid.*

See PRESIDENT, 2, 3.

PATENTS.

1. A patent for printing wooden mail-tags by a particular machine and process is not infringed where the tags are printed or produced by a different machine and process. 209.
2. Where claims presented to the Secretary of War for the use of certain patents were not based upon contracts, and involved questions proper for judicial rather than executive determination: *Advised* that he ought not to act upon them officially until the questions referred to are settled. 301.

PAY OF PROMOTED OFFICER.

See COMPENSATION, 11, 12.

PENSIONS.

1. The third *proviso* of the act of April 20, 1844, chap. 15, declaring that "no person in the Army, Navy, or Marine Corps shall be allowed to draw both a pension as an invalid and the pay of his rank or station in the service, unless the alleged disability for which the pension was granted be such as to have occasioned his employment in a lower grade, or in some civil branch of the service," is not repealed by the 5th and 13th sections of the act of July 14, 1862, chap. 166. 94.
2. The widow of a deceased naval officer was allowed a pension from June 23, 1843, the date of his death, up to April 8, 1847, the date of her second marriage, after which it was discontinued. In 1854 she obtained a divorce from her second husband for intemperance and cruelty. She now alleges that the latter, at the time of her

PENSIONS—Continued.

marriage with him, had a wife living, and that she was cognizant of this when she instituted her suit for divorce, but remained silent as to the fact. And she claims a restoration of the pension formerly allowed her as the widow of said officer, on the ground that her second marriage was illegal and her right to the pension was not determined thereby. *Held*, however, that by promoting said suit, and procuring a decree which in effect affirmed the validity of her marriage while declaring its dissolution, the claimant has rendered the objection of illegality of the marriage unavailable in support of her claim, so long as that decree stands unvacated or judicially unimpeached. 220.

3. In that suit both the fact and the validity of the second marriage were directly in issue as the very foundation of the proceeding; and a sentence of divorce, so far as it affects the *status* of the parties, is regarded as a judgment *in rem*, and, if free from fraud, furnishes in general conclusive proof of the facts which were in issue and were adjudicated by it, as well against strangers as against the parties. *Ibid*.
4. The claimant ought not to be permitted to prevail against proof of this high character, by showing, after the lapse of twenty years from the rendition of the decree of divorce, that she obtained it upon a misrepresentation of the facts to the court. *Ibid*.

POSTAL LAWS.

1. The 18th section of the act of March 3, 1845, chap. 43, makes it the duty of the Postmaster-General, in every case, to let contracts for mail-service to the lowest bidder offering a sufficient guarantee for the performance of the same. But the statute is to receive a reasonable construction; and inasmuch as payment of a less amount than one cent cannot, practically, be made by the Government, that constitutes the lowest amount at which a bid can be entertained by the Postmaster-General. 56.
2. Accordingly, as between two bidders for carrying the mail over a particular route for a certain period, one of whom offered to perform the service for *one-fourth of a cent* and the other for *one cent*: *Held* that the latter is the only bid of the two which is entitled to acceptance. *Ibid*. -
3. The 170th section of the act of June 8, 1872, chap. 335, authorizing the Postmaster-General to furnish and issue to the public postal cards, does not empower him to enter into any contract for the future payment of money to persons supplying them, in the absence of any appropriation by Congress which is applicable to the subject. 107.
4. No authority is conferred upon the Postmaster-General by the provisions of the 301st and 302d sections of the act of June 8, 1872, chap. 335, or by the provisions of any other section of that act, to order the detention of mail-matter after it has reached its destina-

POSTAL LAWS—Continued.

- tion and been distributed by the postmaster ready for delivery, though there may be a well-grounded suspicion that it is or has been attempted to be circulated in violation of law. 143.
5. The citizens of the city of Davenport, Iowa, are not prohibited by the act of June 8, 1872, chap. 335, from employing a private dispatch-company to carry and deliver, within the city limits, sealed letters on which no United States postage has been paid; it appearing that the free delivery of mail-matter has not been established there, and that, accordingly, the streets of the city are not post-routes. 152.
 6. Letters on which postage has not been fully prepaid at the time of mailing them should be charged at the office of delivery only with the amount of the deficiency. 186.
 7. Meaning of the words "one full rate of postage," and also of the words "unpaid rate," as employed in section 151 of the act of June 8, 1872, chap. 335, explained. *Ibid.*
 8. That section only applies when mail-matter is deposited in the post-office, chargeable with two or more rates, one of which, at least, has been paid; and in regard to such matter both the paid and the unpaid rates are governed by the same standard. *Ibid.*
 9. Where the Postmaster-General advertised for proposals for carrying the mail on route number 43132, "from Portland, by Port Townsend and San Juan, to Sitka and back," stating the frequency of the service, &c., as required by section 243 of the act of June 8, 1872, chap. 335; and then, under the same number, added, "Proposals invited to begin at Port Townsend, five hundred miles less:" Held that an offer to carry the mail, in response to the latter, cannot be regarded as a bid after due advertisement made, such as would authorize a contract to be awarded thereon; the time and frequency of the service "to begin at Port Townsend" not having been specified in the advertisement. 339.
 10. The law requires due advertisement as well as due proposal, and no amount of precision in the latter can obviate a want of compliance with the law in the former. *Ibid.*
 11. The 4th section of the act of June 14, 1858, chap. 164, applies to mail-service by sea between the United States and foreign countries, and not to that between ports or places within the limits of the United States; hence it is inapplicable to the route from San Francisco, Cal., by sea, to San Diego, Cal. 585.
 12. Nor does section 14 of the act of March 3, 1845, chap. 43, apply to contracts for carrying the mail over that route. *Ibid.*
 13. It is the duty of the Postmaster-General, before contracting for regular mail-service upon said routes, to advertise as required by the 10th section of the act of March 3, 1825, chap. 64, and its supplements. *Ibid.*
 14. A certified check drawn by a bidder, payable to the order of the person who at the time is Postmaster-General, but omitting any reference to his official position, does not meet the requirements

POSTAL LAWS—Continued.

- of section 253 of the act of June 8, 1872, chap. 335; the official designation should accompany the name. 631.
15. Where such check is drawn payable to the bidder or a third party—and by him indorsed payable to the order of the Postmaster-General, this is a sufficient compliance with said section. *Ibid.*
 16. A single check will not suffice for several persons bidding for distinct routes. *Ibid.*
 17. The substitution of bank-notes or other currency for a certified check, to accompany the bid, is inadmissible. *Ibid.*
 18. *Quare*, where a single certified check, less in amount than is required by the statute, accompanies the bids of one person for two or more routes, whether it may authorize a contract for any one of such routes if it be sufficient in amount for the same taken singly. The Attorney-General inclines to the opinion (differing herein from the view of the Solicitor-General) that the Postmaster-General may accept the check and award a contract in such case. *Ibid.*
 19. A check in the following form: "Pay to John A. J. Creswell, Postmaster-General, or order, nine hundred dollars, provided the bid of A. B. is accepted on route No. —, and he fails to enter into contract for the same; and in case bid is not accepted nor contract is made, check to be returned to drawer:" *Held* inadmissible, the proviso thereto invalidating it. *Ibid.*
 20. The act of June 8, 1872, chap. 335, furnishes the exclusive rule for determining what mail-contracts do, and what do not, require previous advertisement. 651.
 21. Previous advertisement is required by that act in all cases other than those which are therein excepted; and among the latter the case where a route has been left vacant by the actual or virtual abandonment of a contract partially performed is not included. *Ibid.*
 22. In such case the Postmaster-General may make a new contract only after previous advertisement, and he has in the mean time no power to make intermediate provision without advertisement. *Ibid.*
 23. Where the Postmaster-General advertised for proposals for furnishing the Post-Office Department with stamped envelopes, the advertisement reserving to him "the right to reject any and all bids, if in his judgment the interests of the Government required it:" *Held* that it was competent to the Postmaster-General to make such reservation and to act upon it. 682.

POSTMASTER-GENERAL.

See FORFEITURE; POSTAL LAWS, 1, 3, 4, 13, 18, 22, 23.

PRESIDENT.

1. The President has power to fill vacancies happening subsequent to March 3, 1872, in the centennial commission created by the act of March 3, 1871, chap. 105, on the nomination of the governors of the States and Territories respectively. 48.

PRESIDENT—Continued.

2. The President may grant a conditional pardon, and he may remit a part of the penalty or punishment without remitting the whole. 124.
3. Hence he can pardon a deserter so as to re-enfranchise him, (i. e., remove the disabilities imposed by section 21 of the act of March 3, 1865, chap. 79,) and at the same time make the pardon conditional upon his not becoming thereby entitled to any moneys forfeited; and a condition of this sort would exclude any right to the pay referred to in the joint resolution of March 1, 1870, [No. 18.] *Ibid.*
4. The consolidation by the President, on the 23d of January, 1871, of the two pension-agencies previously existing in the city of New York was within the competency of the Executive, and a valid exercise of power. 147.
5. The authority given the President by the act of February 5, 1867, chap. 32, touching the establishment of pension-agencies and the appointment of pension-agents, may be exercised by him according to his judgment, subject only to the restrictions imposed by the two *provisoes* in that act. *Ibid.*
6. Where calls are made upon the President, under section 4, Article IV, of the Constitution, by two persons, each claiming to be governor of the same State, to protect the State against domestic violence, it of necessity devolves upon the President to determine, before giving the required aid, which of such persons is the lawful incumbent of the office. 391.
7. Where, under the operation of the act of March 2, 1875, chap. 118, and the joint resolution of March 3, 1875, [No. 7,] two vacancies existed in the office of paymaster in the Army, with the rank of major, and nominations therefor were sent to the Senate by the President, but which that body failed to confirm before adjourning: *Held* that it is competent to the President to fill the two vacancies, during the recess of the Senate, by temporary appointments, and that he is not subject to any restrictions as to the persons whom he may thus appoint. 562.
8. The construction put upon the clause in the Constitution giving the President power "to fill up all vacancies that may happen during the recess of the Senate by granting commissions which shall expire at the end of their next session," by former Attorneys General, namely, that it confers upon him full power to fill vacancies in the recess of the Senate *irrespective of the time when such vacancies first occurred*, considered now to be the settled interpretation of that clause with the Department of Justice. *Ibid.*
9. The President may, subject to the restrictions imposed by section 1224 of the Revised Statutes, direct the military commandant in Alaska to execute the duties of an Indian agent there. 573.
10. It is competent to the President, on the presentation for his approval (under section 9 of the act of July 1, 1862, chap. 120) of a map of the route of the contemplated extension of the Central Branch Union Pacific Railroad west of the meridian of Fort Riley, to make

PRESIDENT—Continued.

a provisional approval of the route solely for the purpose of withdrawing the lands from private entry along the same, without prejudice to his right of ultimately disapproving it; such a course would not at all commit him in regard to his final action upon the matter. 606.

See INDIAN COUNTRY, 6, 7.

PRINTING.

Section 10 (third *proviso*) of the act of March 2, 1867, chap. 167, does not require "printing" ordered by Executive Departments to be performed at such newspaper-offices only as are designated by the Clerk of the House of Representatives under section 7 of the same act. 616.

See APPROPRIATIONS, 4.

PRISONERS OF WAR.

See APPROPRIATIONS, 1, 2.

PRIVATE LAND-CLAIMS.

1. A survey of a private land-claim in California was made in 1867, and forwarded by the surveyor-general for that State to the Commissioner of the General Land-Office, who approved the same, but from whose decision an appeal was taken to the Secretary of the Interior, by whom the survey was disapproved and a new one ordered, which has not been made. *Held*, upon these facts, that it was competent to the successor in office of the Secretary who ordered the new survey to set aside or revoke that order. 74.
2. In the matter of the claim for a tract of land near Saint Louis, Missouri, confirmed to Angelica Chouvin, assignee of Jean F. Perry, in 1811, the facts presented showing that two surveys of the claim have been made, but that both of them have been rejected by former heads of the Land Department: *Held* that it is competent to the present head of that Department to order a new survey. 95.
3. The 7th section of the act of March 3, 1807, chap. 36, entitles the claimant to a survey that will determine the location and boundaries of the land, and enable him to obtain the patent provided for by the 6th section of the same act. *Ibid*.
4. In the case of the rancho "Guadalupe," (which involves the validity of two patents issued upon a California private land-claim, one in 1866 and the other in 1870—both, however, having been afterward recalled by the Land Department,) upon the facts submitted: *Held* that there was no legal authority for issuing the second patent, and that the first patent should be delivered to the confirmees of the claim. 601.
5. The provision in the act of June 14, 1860, chap. 128, that notice of the survey and plat made by the surveyor-general of California be given by advertisement, requires a period of four weeks to elapse between the first insertion and the act to be done (i. e., the removal

PRIVATE LAND-CLAIMS—Continued.

- of the plat, &c., from the surveyor-general's office) which such notice is to precede, the insertions being repeated once a week in each week during the same period. 602.
6. Advertisement of said notice was made at Santa Barbara, in a news paper called the "Santa Barbara Gazette," which was printed in San Francisco and thence immediately sent to Santa Barbara for distribution, where it was distributed. *Held* that Santa Barbara may be regarded as the "place of publication" of the paper, and (as far as that is material) the requirement of the statute complied with. *Ibid.*
 7. Private land-claim for the rancho "Los Trigos," in New Mexico, was confirmed (as No. 8) by the act of June 21, 1860, chap. 167, but which act made no provision for the issuing of a patent to the confirmees. The latter, however, contend that they are entitled to have a patent issued to them therefor, first, by virtue of the provisions of art. 8 of the treaty of Guadalupe Hidalgo, (9 Stat., 929;) and, second, by virtue of the provisions of section 2 of the act of March 3, 1869, chap. 152. *Held* that the treaty provisions referred to do not make it obligatory upon the Government to issue patents in such cases; but that, under the provisions of the act of March 3, 1869, the confirmees are entitled to a patent for the claim mentioned. 624.

PRIZE, DISTRIBUTION OF.

1. The facts in the case of Commodore Wyman showing that he, at the time of the capture of the prize-steamer Gertrude by the United States steamer Vanderbilt, "was doing duty on board" the latter vessel within the contemplation of section 3 of the act of July 17, 1862, chap. 204, and was borne on the books thereof: *Held* that he is entitled to participate in the proceeds of the prize according to the rate of his pay in the service at that period. 150.
2. A corporal of a volunteer regiment was detached from his company for service in the "Mississippi Marine Brigade," and while in that service participated in the capture of a prize, whereby he became entitled to share in the residue of the proceeds thereof, after making certain deductions, in proportion to the rate of his pay. He alleges that, when the prize was taken, he was acting as a first lieutenant by direction of the commander of the brigade. A few days before that event, a commission was issued appointing him a first lieutenant in the brigade; but owing to causes beyond his control he did not receive it, and had no knowledge of its existence until several months afterward. He claims a share of the proceeds of the prize as a first lieutenant, though he is entered only as a private upon the prize-list of the vessel on which he served. *Held* that if, as claimant alleges, he was performing the duties of first lieutenant at the period of the capture, then, inasmuch as in such case he would be entitled to the pay of that grade under the provisions of the joint resolution of July 11, 1870, amendatory of the joint resolution of July 26, 1866, he would be equally entitled to share in the prize in proportion to the rate of that pay. 364.

PRIZE, DISTRIBUTION OF—Continued.

3. Where a district court, by its decree, ordered certain money to be distributed as proceeds of prize, one-half to the captors and the other half to the "Navy pension-fund;" and at a subsequent term of the court, the distribution of the money having in the mean time been made as thus ordered, altered its decree by ordering all the money to be paid to the captors as military salvage: *Held* that, as to the money in question, viz, the amount distributed to the "Navy pension-fund," the modified decree was of no effect and void; the funds having then already passed out of the jurisdiction and control of the court. (*Cf.* opinions of Attorney-General Akerman of August 1 and December 6, 1870, in 13 Opin., 299, 348.) 524.

PROCESS.

Personal property situated within the limits of a national cemetery, and belonging to a contractor with the Government, may be attached on mesne process issued by a court of the State, if in the cession of jurisdiction by the State over the land of the cemetery, or in the consent of the State to its purchase by the United States, there was a reservation of the right to serve civil processes on said land. 426.

See WRIT.

PROMOTION.

See ARMY, 1, 2, 4, 8, 9, 10, 12; COMPENSATION, 11, 12.

PROPERTY LOST OR DESTROYED IN THE MILITARY SERVICE

See CLAIMS, 8, 13, 14, 15, 16, 17, 18, 19, 20.

REFUND OF DUTIES.

See INTERNAL REVENUE, 18, 19, 20, 21; SECRETARY OF THE TREASURY, 1, 2.

REGULATIONS.

See ARMY, 2, 3.

REMISSION OF FINES, PENALTIES, AND FORFEITURES.

1. Section 5293 of the Revised Statutes gives the Secretary of the Treasury power to remit fines, penalties, or forfeitures imposed by authority of any provision of law referred to in the first paragraph of that section, "*for imposing or collecting any duties or taxes,*" where the amount of the fine, penalty, or forfeiture does not exceed *one thousand dollars*, without the summary inquiry and statement of facts by a judge, as provided in section 5292 of the same statutes, 454.
2. But if the fine, penalty, or forfeiture was imposed by authority of any provision of law referred to in the same paragraph, "*relating to registering, recording, enrolling, or licensing vessels,*" power is given the Secretary in the former section to remit the same, without the summary inquiry and statement mentioned, only where the amount does not exceed *fifty dollars*. *Ibid.*

See FORFEITURE, 1; PARDON, 3, 4.

REMOVAL.

See TERRITORIAL OFFICERS.

RESERVATIONS, INDIAN.

See INDIAN COUNTRY, 4, 5, 6, 7; NEBRASKA, 4; INDIANS, 2, 3; LANDS, PUBLIC, 8.

RESERVATIONS, MILITARY.

1. Jurisdiction over the lands lying within the limits of the military reservation of Fort Leavenworth passed from the United States to the State of Kansas under the operation of the act of June 29, 1861, chap. 20, admitting that State into the Union; and to restore such jurisdiction to the United States a cession thereof by the State is necessary. 33.
2. Buildings erected on military reservations by post-traders, under a license from the War Department, for the purposes of trade, are not to be regarded as such buildings would be if placed there by trespassers; that is to say, as constituting a part of the realty. 125.
3. A trader, when he removes from his post at a military reserve, has a right to remove the buildings which were erected thereon by him, under such license, and is at liberty to dispose of the materials thereof as his own property. *Ibid.*
4. But the license to erect such buildings, being purely personal to the trader, does not carry with it any right to lease or convey the same to others for their occupation and use, without the permission of the military authorities; his rights are confined solely to that of removing the buildings from the premises. *Ibid.*
5. The provisions of the acts of July 20, 1868, chap. 179, and July 27, 1868, chap. 268, granting to railroad companies rights of way through the Fort Leavenworth military reservation, are to be construed strictly as against the grantees of such rights. 135.
6. The grant made by those acts does not impart to the railroad companies referred to the right to establish cattle-yards or pens, or build structures for a like purpose, either in the roadway or elsewhere upon said reservation. *Ibid.*
7. The "Chicago, Detroit and Canada Grand Trunk Junction Railroad Company" has acquired under the act of February 8, 1859, chap. 26, a valid right to use, or easement in, so much of the Fort Gratiot military reservation as is described in the deed to that company executed by the Secretary of War on the 8th of March, 1859, for railroad purposes. 320.
8. The "Port Huron Street Railway Company" has no right by virtue of the grant made thereto by the Secretary of War, under the joint resolution of January 31, 1866, [No. 5,] to use any part of the land within said reservation which is covered by the right or easement held by the former company. *Ibid.*

See FORT READING.

RESIGNATION.

1. In October, 1872, C., then a surveyor of customs, tendered his resignation, which was subsequently accepted by the President, to take effect on the 31st of January, 1873, about two months before the expiration of C.'s term. The appointment of C.'s successor in office was not made until the last of March, 1873. C., however, did not personally discharge any of the duties of surveyor after January 31, 1873; but, from the latter date until his successor took possession of the office, its duties were performed by the deputy surveyor whom he had previously constituted. Claim is now made by C. for the salary and emoluments of the office for that period. *Held* that, by reason of the tender and acceptance of his resignation, C. ceased to be surveyor on the 31st of January; that the authority of his deputy to act in that capacity thereupon terminated; and that the claim mentioned has no validity. 259.
2. That a public office may be vacated by resignation is not only established by long and familiar practice, but is, moreover, recognized by positive law. *Ibid.*
3. A resignation may be effected by the concurrence of the officer and the appointing power; its essential elements being an intent to resign on the one side and an acceptance on the other. The principle upon which it rests is agreement. *Ibid.*
4. Hence, to perfect a resignation, nothing more is necessary than that the proper authority accept the offer to resign; it then becomes efficient for the end intended, and operates to relieve the incumbent either immediately or on the day specially fixed, according to its terms. *Ibid.*
5. When a resignation once takes effect, the official relations of the incumbent are *ipso facto* dissolved; and he no longer has any right to, or hold upon, the office. *Ibid.*
6. The right of an incumbent of any office established under the Government of the United States to continue therein after the expiration of his term until the appointment of his successor depends upon whether Congress has thus provided; so that, where Congress has not authorized the officer to hold over, his incumbency must be deemed to cease at the end of his term, though no appointment of a successor may then be made. Opinion of Attorney-General Butler (2 Opin., 714) disapproved. 260.
7. *Seem* that even if an officer, in such case, were authorized to hold over after the expiration of his term, his resignation, if accepted would discharge him from office, though a successor might not be appointed when the resignation, by its terms, takes effect. *Ibid.*

RETIRED-LIST.

See COMPENSATION, 2, 3, 5.

REVISED STATUTES.

In construing sections 1222 and 2062 of the Revised Statutes together, the latter must be understood as constituting an exception to the

REVISED STATUTES—Continued.

former; the rule of interpretation applicable thereto being, that where a general intention is expressed in a statute, and the statute also expresses a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception. 573.

See ADVERTISEMENTS, 1; ATTORNEY-GENERAL, 10; CLAIMS, 18; CONSULAR COURT, 3; CUSTOMS LAWS, 9, 10, 13; INDIAN COUNTRY, 6; INDIANS, 3; INTERNAL REVENUE, 18, 19; MILITIA, 2; NAVIGATION, 6; OFFICER, 2; PRESIDENT, 9; REMISSION OF FINES, PENALTIES, AND FORFEITURES; STAMP; TONNAGE DUTY, 1; TRAVELING ALLOWANCES, 3, 4.

RUSSIAN-AMERICAN COMPANY.

See ALASKA, 1, 2, 3.

SEA-SERVICE.

See NAVY, 1, 4, 5.

SEAMEN.

See FEES AND COSTS, 4; SHIPPING, 5.

SECRETARY OF THE INTERIOR.

See LANDS, PUBLIC, 8.

SECRETARY OF THE NAVY.

See EMPLOYMENT OF COUNSEL; NAVY, 6.

SECRETARY OF STATE.

See APPROPRIATIONS, 6.

SECRETARY OF THE TREASURY.

1. The first section of the act of March 3, 1875, chap. 136, (save as to what is excepted under the *provisoes* therein,) leaves no power in the Secretary of the Treasury to refund any moneys collected as duties on imports in accordance with any decision, ruling, or direction made or given by that officer prior to the passage of that act, unless such decision, ruling, or direction is modified or overruled as therein indicated. 559.
2. Nor can moneys collected as duties on imports in accordance with any decision, ruling, or direction of the Secretary of the Treasury, made on or after the date of that act, be refunded or repaid, except as provided for in said 1st section. *Ibid.*
3. Under the 2d section of the same act, a decision *favorable* to the United States, which was unreversed and in force at the date of the act, must stand and be recognized by the Secretary of the Treasury as the rule to be followed upon the question involved therein, until it is reversed or modified as provided in said 2d section; but any decision, ruling, or direction which is *not favor-*

SECRETARY OF THE TREASURY—Continued.

able to the United States, made by any Secretary of the Treasury prior to the date of the act, may be overruled by the present or any future Secretary of the Treasury, if in his judgment it is not a correct exposition of the law. *Ibid.*

See COTTON CLAIMS, 4; CUSTOMS LAWS, 17; FOREIGN COINS; FREEDMAN'S SAVINGS AND TRUST COMPANY; INDIANS, 1; NAVIGATION, 6; REMISSION OF FINES, PENALTIES, AND FORFEITURES.

SECRETARY OF WAR.

See ALASKA, 4, 5; PATENTS, 2; BRIDGE, 2, 5; CLAIMS, 11; ENLISTMENT, 3; INDIAN COUNTRY, 1, 2, 7.

SHIPPING.

1. Under the provisions of the 1st and 4th sections of the act of December 31, 1792, chap. 1, no vessel in which a foreigner is directly or indirectly interested can lawfully be registered as a vessel of the United States; nor can it be deemed a vessel of the United States or entitled to the benefits or privileges appertaining to a vessel of that description. 340.
2. So where a vessel has been registered, but the registry was obtained by a false oath as to its ownership, the vessel being at the time owned in whole or in part by foreigners, it cannot be deemed a vessel of the United States. *Ibid.*
3. *Semble* that the *Virginus*, though registered as an American vessel, was in fact owned by foreigners, and that the registry thereof was fraudulently obtained; and hence, at the time of her capture by the Spanish man-of-war *Tornado*, she had no right, by virtue of that registry, as against the United States, to carry the American flag. *Ibid.*
4. Yet, while upon the high seas, actually bearing an American register and carrying an American flag, she was as much exempt from interference by another power as though she had been lawfully registered; the question whether or not her register was fraudulently obtained, or whether or not she was sailing in violation of any law of the United States, being one over which such power could not then and there rightfully exercise jurisdiction. *Ibid.*
5. Four seamen deserted from an American merchant-vessel in a foreign port, leaving in the hands of the master, besides what was due them as wages, some clothing and other effects, all of which the master delivered to the United States consul at the port on the demand of the latter. By instructions from the State Department, the consul sold the clothing, &c., and forwarded the proceeds thereof, with the amount due the seamen as wages, to that Department. No proceedings have been instituted against the seamen for the offense of desertion. Upon the question as to what disposition should be made by the Department of the money: *Advised* that the funds, together with a statement of such facts touching the case as may be in the possession of the Department, be transmitted to the circuit judge for the district wherein the port

SHIPPING—Continued.

- is in which the vessel is owned or at which her voyage terminated. 520.
6. A consul has no authority to demand and receive from the master of a vessel the money and effects belonging to a deserter from the vessel. *Ibid.*
 7. The steps which should be taken by the master, with reference to the disposition of such property, indicated. *Ibid.*

SOLDIERS' HOME.

See INVALID SOLDIERS, 1, 2.

STAMP.

In placing the portraits of living persons upon *internal-revenue stamps* there is really no infraction of the provisions of section 3576 of the Revised Statutes; nor are such ornaments forbidden to be placed on such stamps by any other legislative enactment; yet their exclusion therefrom would seem to be in consonance with the spirit of said section. 528.

STATE BANKS AND BANKING ASSOCIATIONS.

See INTERNAL REVENUE, 4, 5, 15, 16.

STATE TAXES.

1. *Semble* that inasmuch as the title to the site of the national cemetery at Grafton, in West Virginia, is not yet vested in the United States, nor jurisdiction over the same ceded thereto by the State, the local laws imposing taxes on personal property may be enforced upon such site the same as elsewhere in the State, and, consequently, that no exemption in favor of personal property belonging to the superintendent of the cemetery can be claimed simply because it is found thereon. 27.
2. With respect to land owned by the United States within the limits of a State, over which the State has not parted with its jurisdiction, the United States stand in the relation of a proprietor simply; and the State officers have the same right to enter upon such land, or into the buildings located there, and seize the personal property of individuals for non-payment of taxes thereon, as they have to enter upon the land or into the buildings of any other proprietor for the same purpose; such right being so exercised as not to interfere with the operations of the General Government. 199.

SUITS AGAINST PUBLIC OFFICERS.

Judicial proceedings, by and in behalf of certain private parties, having been had before H. in the consular court at Alexandria, Egypt, while he held the office of consul-general there, against one D., the latter afterward instituted a suit against H. in the supreme court of the District of Columbia, complaining that he, H., acted in bad faith, maliciously, and without authority of law

SUITS AGAINST PUBLIC OFFICERS—Continued.

in said proceedings, whereby the plaintiff sustained great damage—&c. H. informed the Department of State of the pendency of the suit, asking that the United States assume the defense thereof: *Advised* that, as the proceedings against D. were not promoted by or in the interest of the United States, the latter are under no obligation to assume the defense of the suit. 189.

SUSPENDED LAND-ENTRIES.

1. Where certain lands were withdrawn to supply certain land-grants, as to a part of which lands the Commissioner of the General Land-Office afterward ordered notice to be given, by advertisement, restoring the same to private entry, and, pending the advertisement, erroneously instructed the register and receiver that certain other lands were included in such notice, in accordance with which instruction the latter were offered at private sale by the register and receiver, and were thereupon entered and paid for by S. and W.: *Held* that these facts are sufficient to give the board of adjudication of suspended entries jurisdiction of the claim of S. and W. to a patent for the land entered by them, and that if, upon investigation, the board should find that due publicity had been given to the fact of restoration, it might disregard the forms (though adopted inadvertently) by which that publicity was attained. 637.
2. *Semble* that notice of restoration of land to private entry, after having been once withdrawn therefrom, is not necessary, as assumed in the opinion of March 11, 1874, (see *supra* 1; also *ante*, p. 637,) to enable the board of adjudication of suspended land-entries to take jurisdiction of a private entry on such land and confirm it 646.

SUSPENDED OFFICER.

See COMPENSATION, 8.

TELEGRAPH.

1. The act of March 29, 1867, chap. 15, conferring certain rights and privileges upon the American Atlantic Cable Telegraph Company, does not preclude Congress from at any time conferring similar rights and privileges upon any other company. 62.
2. The establishment of telegraphic lines connecting the United States with other countries properly falls under the regulative power of Congress; but that body has as yet made no general regulations on the subject. *Ibid.*
3. The act of July 24, 1866, chap. 230, was intended to apply to interior lines of telegraph—that is to say, those established between points within the United States—and not to exterior oceanic lines designed for communication with foreign lands. 63.
4. Section 2 of the act of July 24, 1866, chap. 230, requires all telegraph companies which have accepted the rights and privileges conferred

TELEGRAPH—Continued.

- by that act, together with the restrictions and obligations thereby imposed, to give priority to messages from officers and agents of the United States to the several Departments, and to transmit them at the rates fixed by the Postmaster-General, whether the messages are received from such officers and agents directly, or through other connecting telegraph lines. 123.
- 5. The papers submitted disclosing the fact that the line of telegraph operated by the Western Union Telegraph Company along the route of the Union Pacific Railroad and of the Central Pacific Railroad, from Omaha to San Francisco, is a different line from that originally built and equipped between the same termini by the Union Pacific Railroad Company and the Central Pacific Railroad Company, under the act of July 1, 1862, chap. 120: *Held* that the line operated by the Western Union Telegraph Company is not subject to the provisions of that act and of its supplements, requiring one-half the compensation for services rendered the Government over the telegraph-lines established thereunder to be applied to the payment of the bonds issued by the United States in aid of the construction thereof, and that no portion of the compensation allowable for the transmission of Government dispatches over the said line can be retained for payment of the bonds mentioned. 173.
- 6. Respecting the telegraph-line operated by the Western Union Telegraph Company along the route of the Kansas Pacific Railroad, the Attorney-General declines to express an opinion without more specific information. *Ibid.*
- 7. Telegraphic messages between district attorneys and marshals, on official business, are entitled to be transmitted over telegraphic lines operating under the provisions of the act of July 24, 1866, chap. 230, at the rates fixed by the Postmaster-General pursuant to the 2d section of that act. 278.
- 8. The word "between," as used in that section, is to be taken distributively, as applying to official communications between one Department of the Government and another, between a Department and its officers and agents or the officers and agents of another Department, between officers and agents of the same Department, and, finally, between officers and agents of one Department and those of another. *Ibid.*
- 9. The only limitation applicable is, that the telegraphing must be in cases where the rates are payable out of public moneys, or are to be accounted for to the Government by the officer making the expenditure. *Ibid.*
- 10. Statutory provisions relating to the establishment of the telegraph-line along the route of the Kansas Pacific Railroad, and the payment of compensation for the transmission of dispatches over the same, reviewed. 313.
- 11. One-half of the compensation chargeable for sending such dispatches over that line should be retained and applied to the payment of

TELEGRAPH—Continued.

the bonds issued by the United States in aid of said railroad, notwithstanding that at the time the dispatches were sent the line was actually managed and operated, not by the Kansas Pacific Railroad Company, but by the Western Union Telegraph Company, and the service was rendered directly to the Government by this company. *Ibid.*

TENURE-OF-OFFICE ACT.

See COMPENSATION, 8.

TERRITORIAL OFFICERS.

1. As a general rule, the governor of a Territory can remove only such officers as have been duly appointed by him to hold at pleasure. 422.
2. He has no power to remove officers appointed during pleasure by others than himself, or officers whose tenure is for a stated term, or for good behavior, unless so authorized by the organic law or (in some cases) by the territorial law. *Ibid.*
3. Accordingly, where certain officers created by a territorial statute were appointed by the governor, with the consent of the council of the Territory, for the term of two years: *Held* that, in the absence of a power of removal expressly conferred by law upon the governor, those officers are not removable by him. *Ibid.*

TESTIMONY OF ACCOMPLICE.

See CUSTOMS-LAWS, 6.

TOBACCO.

See INTERNAL REVENUE, 6, 7, 8.

TONNAGE-DUTY.

1. The Revised Statutes have made no change in the law respecting tonnage-duties upon vessels engaged in foreign commerce. The substance of that law is correctly expressed in the Treasury circular of June 6, 1874, and no reason is perceived for changing the directions therein given. 450.
2. Provisions of the 9th article of the treaty with the Hanseatic Republics of December 20, 1827, together with the provisions of the 4th article of the treaty with Belgium of July 17, 1858, considered with reference to the question whether the North German Lloyd Steamship Company is entitled to a refund of the tonnage-tax collected in ports of the United States on that company's steamers, whose home-port is Bremen; and *held*, upon the facts presented, that the steam-vessels of Bremen plying regularly between that port and the United States have, during the entire period subsequent to the date of the ratification of said treaty with Belgium, been exempt from such tax in American ports by force of the 9th article of said treaty with the Hanseatic Republics; *held, also*, that where the tax has been exacted and collected from such vessels in American ports, at any time within that period, it should be refunded. 530.

See NAVIGATION, 4, 5, 6.

TRAVELING-ALLOWANCES.

1. By section 7 of the act of March 2, 1867, chap. 170, provision is made for additional traveling-allowances in favor of "such California and Nevada volunteers as were discharged in New Mexico, Arizona, or Utah, and at points distant from the place or places of enlistment;" and all who fall within that description are authorized to be paid, under the regulations of the Secretary of War, according to the distance traveled by each in returning from the place of discharge to the place of enlistment. 40.
2. Where a naval officer traveled under orders from New York to San Francisco via the Isthmus of Panama in the years 1860 and 1860, (before the opening of the overland route:) *Held* that, under the 2d section of the act of March 3, 1835, chap. 27, he was entitled to an allowance of ten cents per mile for traveling-expenses. 590.
3. The *proviso* in the appropriation act of June 16, 1874, chap. 285, declaring "that only *actual traveling-expenses* shall be allowed to any person holding employment or appointment under the United States," applies to United States marshals, and, therefore, supersedes the provision in the fee-bill (Rev. Stat., sec. 829) allowing mileage to those officers. 681.
4. The provision in the act of June 16, 1874, chap. 285, as to the allowance of "actual traveling-expenses," supersedes the provision in the fee-bill (Rev. Stat., sec. 829) allowing mileage to marshals on account of each necessary guard employed in transporting prisoners, &c., the same as on any other account whatever. 683.
5. In the case of a guard so employed, his compensation, actually and necessarily paid, constitutes, as well as his traveling-expenses, a part of the actual traveling-expenses of the marshal, within the meaning of the law. 684.

TREATIES WITH FOREIGN NATIONS.

See ALASKA, 1, 2; CITIZENSHIP, 1; EXTRADITION; NAVIGATION; TONNAGE-DUTY, 2.

TREATIES WITH INDIAN TRIBES.

See INDIAN COUNTRY, 5.

"UNITED STATES MAIL-PACKETS."

See FOREIGN MAIL SERVICE.

VIRGINIUS, THE.

See NEUTRALITY ACT; SHIPPING, 3, 4.

WISCONSIN.

See GRANT, 5, 6, 7, 8, 9, 10, 11, 12.

WITHDRAWAL FOR EXPORTATION.

See CUSTOMS-LAWS, 9, 10, 11.

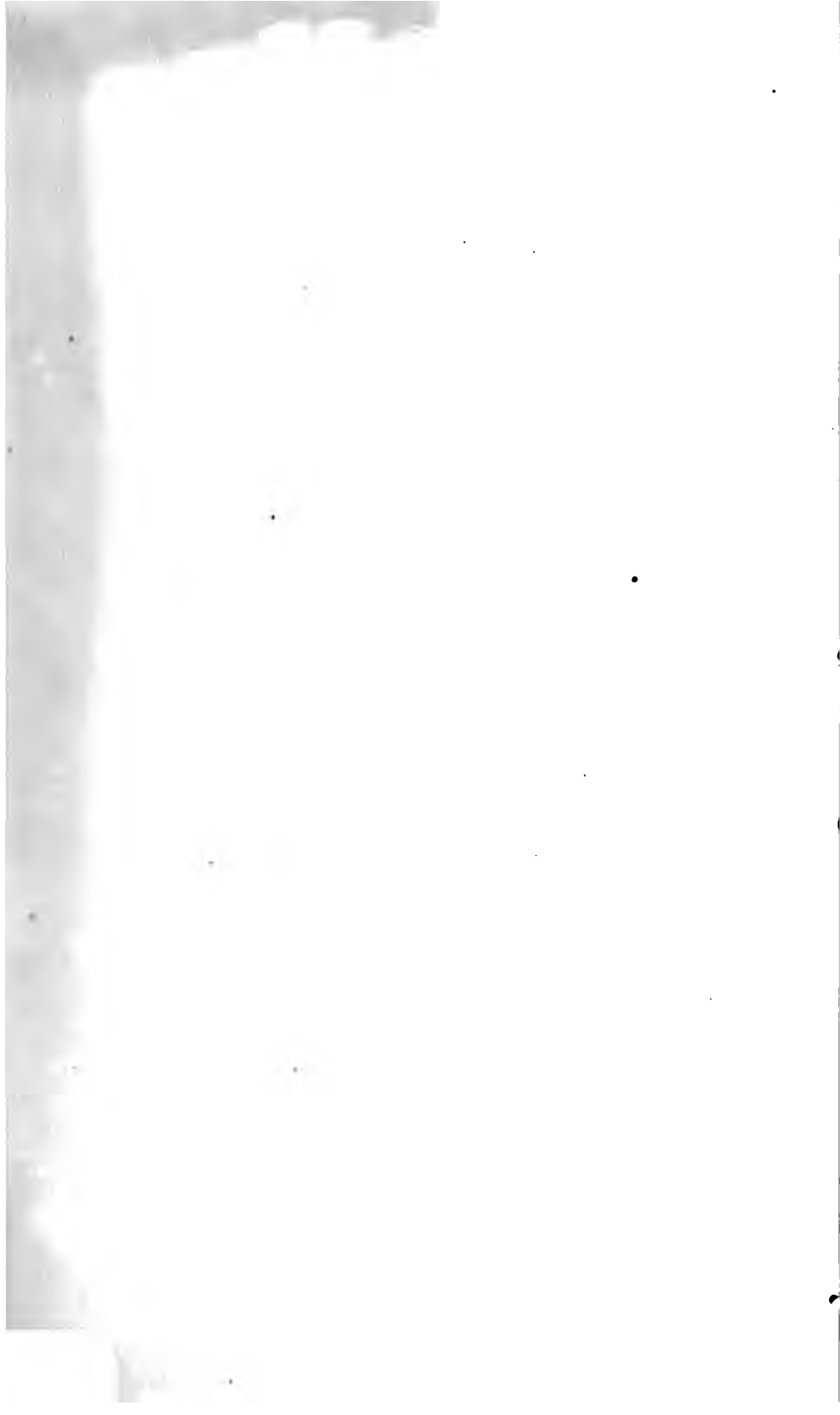
WRIT.

1. *Semble* that under the 6th section of the act of March 3, 1797, chap. 20, a writ of execution upon a judgment obtained in favor of the United States, issued by a court of the United States in any State, "may run and be executed in" the District of Columbia. 384.
2. Accordingly, where two such writs were directed to the marshal of said District from the United States circuit court for the western district of Tennessee : *Advised* that it was his duty to execute them *Ibid.*

YERBA BUENA.

See LANDS, PUBLIC.









Stanford Law Library



3 6105 062 900 126

